



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT SUCCESSION CAUSE NO.118 OF 2013

IN THE MATTER OF ESTATE OF MOSES MWANIKI GATHU alias MWANIKI s/o GATU (DECEASED)

MARY WAIRIMU MWANIKI.....1ST APPLICANT

EUNICE WANGUI GATIMU.....2ND APPLICANT

BETWEEN

ALICE WAIRIMU MWANIKI.....1ST RESPONDENT

LYDIA WAMUYU WACHIRA.....2ND RESPONDENT

JUDGMENT

By a letter dated 28th February 2013, the Assistant Chief Kihuro Sub- location Irene Nyaguthii wrote to the Registrar High Court regarding Moses Mwaniki Gathu -Deceased that he died on 9th September 2012 and was survived by 2 wives and 7 children;

1. Purity Gathoni Gatimu - 1st wife
2. Alice Wairimu Mwaniki -2nd wife
3. Tabitha wanjugu Karaya - Daughter
4. Eunice Wangui Gatimu - Daughter
5. Mary Wairimu Mwaniki - Daughter
6. SWM -Son
7. AWM- Daughter
8. MWM-Daughter
9. AGM-Daughter

Mary Wairimu Mwaniki and Eunice Wagui Gatimu filed citations in HC. Succession Cause No.446 of 2013 on 25th June 2013 and cited Alice Wairimu Mwaniki. She was served on 22nd July 2013.

Their effort ended there. On 24th January 2013- the senior chief Wilfred N. Karangi of Ruguru Location wrote a letter to the Registrar High Court Nyeri – stating that the deceased hailed from Kihuro sub-location Ruguru of Mathira West District- he listed the heirs of the deceased as;

1. Alice Wairimu Mwaniki - Widow -32 yrs

2. SWM - Son -12 yrs
3. AWM - Daughter - 9 yrs
4. MWM - Daughter - 8 yrs
5. AGM - Daughter - 7 yrs

This chief left out the protestors.

Alice Wairimu became administrator together with Lydia Wamuyu Wachira. They were issued with grant of letters of administration intestate on 13th May 2013.

On 30th July 2013 they filed summons for confirmation of grant where Alice Wairimu Mwaniki sought that the property **KONYU/ICHUGA/696** to be registered on her behalf and trustee for her children.

A certificate of confirmation of grant was issued on 30th July 2013. On 2nd September 2013 Mary Wairimu Mwaniki and Eunice Wangui Gatimu filed summons for Revocation of grant under s.76 (b) and (c) seeking orders: -

1. *THAT the letters of administration and the confirmation of grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.*
2. *THAT the grant was obtained by means of untrue allegation of the fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*
3. *THAT all the wives and the children of the deceased were not disclosed and included in the succession proceedings.*

The same was supported by the affidavit of Mary Wairimu Mwaniki with the authority of her co-applicant – that their mother Purity Gathoni Gatimu was the 1st wife of the deceased and they were her children – that the chief who had introduced the petitioner had excluded them; that they had filed succession cause – cited the petitioner but she went ahead to file another cause without their knowledge.

The Summons for confirmation of grant and protest were heard by way of oral evidence.

The protestors testified and called one witness. Each had filed witness statement which each adopted together with the summons for revocation of grant and the supporting affidavit and annexures.

The petitioner respondent also testified.

According to the protestors their father – the deceased herein was married to their mother, but the two separated in the 90s. The 1st protester was born in 1985, 2nd protester- 1983. When their mother left, their father married the petitioner in 2001- by then he was 60 years old- there was an age difference of almost 40 years.

She did not treat them well. When their father died in 2012- her hostility had escalated to such an extent that they had to be issued with a joint burial permit with a copy for each house. When they filed the cause, they cited her and she was served but she instead moved to court filed a different cause without involving them and with a chief's letter that excluded them.

PW3, a friend of their father testified that when his 1st wife left, she left the deceased with the children.

The protestors produced their certificates of birth, the one for Eunice was issued on 14th October 2013, for Mary – 1st September 2006 showing that deceased was their father. Eunice also produced her KCPE certificate for 1999 showing that she attended Kihuro Primary school and used the surname Mwaniki. She also produced the burial permit issued jointly to Mary Wairimu and Alice Wairimu. In addition, they produced the Eulogy for deceased which included them and their sister as children of the deceased. They testified they left home around the time the petitioner was married- 2002-2003 thereabouts.

The petitioner/ respondent testified that when she got married to the deceased in 2002 he was living alone and that she never found the two protestors in that home. She said she did not know that the deceased was married before he married her and that she saw their names in the Eulogy after the burial. She said she was born in 1981 and when she got married to the deceased he was 60 years old. She denied ever being served with the citation by the protestors.

Parties filed written submissions through respective counsel- Mr. Gathiga Mwangi for petitioner/respondent, Mr. M. K. Kiminda for protestors.

It was argued for the protestors that only 2 issues stood out for determination-

- whether they were children of the deceased,

- whether they were entitled to a share of the estate.

It was argued that they had established that they were children of the deceased. That the respondent could not explain how they came to be in her husband's Eulogy/even how the 1st protesters name appeared in the burial permit together with hers.

The applicants demonstrated that the deceased was their father. It was also argued that they were dependants with the meaning of s.29 (a) of the Law of Succession Act and since the deceased was polygamous – s.40 of the Law of Succession Act ought to apply in the distribution of the estate.

For the petitioner/respondent it was argued that though the 2 demonstrated they were children of the deceased, they abandoned him in 2001 and that they did not demonstrate that they were dependants. That they had not made any application under s.26 of Laws of Succession Act. That *“the deceased left minor children and their claim on the estate would in general fall on its face”* That the grant was not confirmed; was not obtained fraudulently, no false statement was made, nothing from the court to rely or to revoke the same. That the petitioner was residing on the estate with deceased and therefore entitled to obtain representation and that it was clear *“under intestacy a divorced spouse has no right to the intestate estate whether under customary law or under statute”*. That deceased died intestate and that under s.66 Laws of Succession Act the court has discretion on the person whom grant of letters should be granted and under s.58 – there is provision for joint administrators where there are minors, hence no proper ground for revocation had been established.

I have carefully considered the evidence on record, the affidavit in support of the protest and the summons for confirmation of grant, and submissions by each counsel.

i) Are the protesters children of the deceased?

There is sufficient evidence that indeed the 2 protesters are children of the deceased. Firstly, the area assistant chief Kahuro sub-location where the deceased hailed confirmed the same vide her letter of 28th February 2013 where she listed the widow –petitioner/respondent and all the deceased children. This was also evidenced by the Eulogy read at the deceased's funeral which the petitioner/respondent attempted to disown by saying that she saw it after the funeral. Surely that cannot be true – the deceased was described as a prominent vegetable and fruit farmer acquiring the nick name *“Mboga”*. He was known and so was his family. The people tasked with drawing the Eulogy could not have put strangers in the Eulogy. It is evident that his 1st wife was not mentioned because again it must have been in the public domain that she had left him.

The burial permit was issued jointly to Alice – the widow and Mary the 1st protester because she is a daughter of the deceased for a reason. What other explanation could there have been except that the larger family knew the children of the deceased? The deceased was not a young man and it is not possible that his death, funeral and burial were not dealt with by community elders.

The petitioner/respondent never raised any objection to the Eulogy the joint burial permit because these spoke the truth. It would appear that her only contention is that they abandoned their father in 2001.

I have no doubt therefore that the 2 protestors are children of the deceased. It is not in dispute that as the spouse the petitioner/applicant had the priority right to obtain letters of administration of estate since the deceased died intestate.

The only problem is that after being served with citation, she went to not to the sub location assistant chief who had issued the all-inclusive letter but to the location chief who gave her a different letter showing that she and her children were the only heirs of the deceased. This action demarcates the difference between her and the protesters – they acting in good faith, acknowledged her- she, acting in what can only be bad faith, excluded them.

The petitioner/respondent was aware of the protesters existence all along even as at the time she filed the cause and she lied to the court when she failed to disclose that the deceased was survived by other children. Even if she became aware of them at the time of the burial- which I found unbelievable- she was seized off the fact as at the time of filing the cause and ought to have listed the three siblings as surviving the deceased in addition to her children.

There is no doubt on the evidence before me that they are children of the deceased. In addition, they are not challenging her priority rights as a widow in any succession matter, they only challenge her exclusion of them. The submissions with regard to s.66 were misplaced in any view.

The inclusion of the 2nd petitioner/administrator was however in order so as to comply with s.58 (1) of the Laws of Succession Act.

ii) Are the protesters entitled to the estate?

At the time the petitioner/respondent was married in the home of the protester they were aged 18 and 16 respectively and she was about 20 years old. It is not far-fetched to imagine the disputes that arose with them expected to tie the line of a step mother who was about their age mate. That could easily explain the fall out and their leaving their home and their father. Does that deprive them of their heritage?

Section 29 of the Laws of Succession Act states: - Dependant means:-

The wife/wives or former wife/wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

The only relevant fact here is that the protesters are children of the deceased. It matters not that the 2 protesters and their sister left home in 2001 neither does it matter that they were not maintained by their father at the time when the deceased died. They do not have to prove dependency. Hence whether or not the deceased had minor children at the time of his demise the protesters were also his children.

The petitioner/respondent was clearly misled by a whole senior chief that she could move with speed, obtain letters of administration and exclude her husband's other children.

Chiefs and their assistants and elders in the country have a big role to play in matters succession as defined by S.46 of Law of Succession Act.

Duties of officers in relation to protection, etc., of deceased's property

(1) Whenever it becomes known to any police officer or administrative officer that any person has died, he shall, unless aware that a report has already been made, forthwith report the fact of the death to the sub-chief of the sub-location or to the chief or administrative officer of the area where the deceased had his last known place of residence.

(2) Any person to whom a report is made under subsection (1) shall—

(a) at the request of any person who appears to have a legitimate interest in the estate of the deceased; or

(b) if no application for representation in respect of the estate has been made within one month after the date of the death of the deceased, forthwith proceed to the last known place of residence of the deceased, **and take all necessary steps for the protection of his free property found there, for ascertainment of his other free properties (if any), for ascertainment of all persons appearing to have any legitimate interest in succession to or administration of his estate, and for the guidance of prospective executors or administrators as to formalities and duties.....**

(3) If any person to whom a report is made under subsection (1) finds that there is any free property of the deceased, or that the person appearing to have the greatest legitimate interest in succession to or administration of his estate are resident in any other sub-location or area, he shall forthwith report those facts to the sub-chief, chief or administrative officer of that other sub-location or area, who shall thereupon take, in respect of the property or persons, the steps prescribed by subsection (2).

(4) An assistant chief, chief or administrative officer becoming aware that there is in his sub-location or area any free property of a deceased person, or that there are resident in his sub-location or area any persons appearing to have the greatest legitimate interest in succession to or administration of the estate of a deceased person, but that no grant of representation in respect of that estate has yet been made, shall, at the request of any person who appears to have any legitimate interest in that estate, and without waiting for a report under this section, forthwith take, in respect of the property or persons, all such steps prescribed by subsection (2)

The greatest role here is to protect the property of the deceased for the benefit of the rightful heirs, to ascertain who these rightful heirs are and to give them proper guidance. This duty they must carry out with honesty and embrace the national values set at Article 10 of the Constitution. The courts depend on them to do this in order to do justice for all the parties. They are bound, as part of the justice system in this regard to be bound by those principles. Chiefs, their assistants and village elders are involved in Alternative Justice Systems and Traditional Dispute Resolution Mechanisms which are some of the principles to guide the exercise of judicial authority as explicitly set out at article 159 (2) that in exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) *alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

(3) *Traditional dispute resolution mechanisms shall not be used in a way that—*

(a) *contravenes the Bill of Rights;*

(b) *is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or*

(c) *is inconsistent with this Constitution or any written law.*

Chiefs are bound to maintain law and order in their jurisdictions. When they issue such introductory letters without ascertaining the proper information they are not only breaking the law themselves but encouraging mayhem. The court is alive to the fact unlike those days when chiefs would be old men who knew nearly everyone, these days the job is competitive, and fairly young people are getting into those offices. It is their social and legal responsibility to ascertain the facts before writing these letters as they are accountable for the information they supply to the court. They will have to consult the elders where they do not know and the community at large to get the true facts. They do not have a choice as the courts rely more and more on them to provide accurate information about their 'subjects'.

In this case the chief was wrong. It is evident that he did not make the requisite inquiries. If he saw the burial permit he ought to have been curious as to who the other person whose name appears there was.

So what orders should issue?

By concealing from court the existence of the other children of the deceased the petitioner/respondent offended the provisions of s.76 (b) and (c) of the Laws of Succession Act.

A. The grant issued to the petitioner respondents and her co administrator is and is hereby revoked a fresh one to issue jointly to the Alice Wairimu Mwaniki and Mary Wairimu Mwaniki.

How should the estate be distributed?

The beneficiaries of the estate are petitioner/respondent her children and the protesters. The protesters and their mother are beneficiaries of the estate and are entitled according to s.40 of the Laws of Succession Act.

There are 9 units made up of the petitioner/respondent household – herself and her 4 children;

1. Alice Wairimu Mwaniki -Widow

2. SWM -Son

3. AWM -Daughter

4. MWM -Daughter

5. AGM -Daughter

and the protesters their mother and sister

1. Purity Gathoni Gatimu - Widow

2. Tabitha Wanjugu Karaya - Daughter

3. Eunice Wangui Gatimu - Daughter

4. SWM - Son

B. The land **KONYU/ICHUGA/696** is 0.81 ha. Divided to 9 units- it gives 0.09. For **1st house** $0.9 \times 4 = 0.36$; **2nd house** $0.9 \times 5 = 0.45$ **HA**

Taking into consideration that the 2nd house lived with deceased till he passed on, they were entitled to his personal effects which the petitioner/respondent must have taken possession of.

C. A certificate of confirmation of the grant to issue in the terms that estate Konyu/Ichuga/ 696 to be shared as follows:

(i) 0.45 to petitioner/respondent Alice Wairimu Mwaniki and her co-administrator Lydia Wamuyu Wachira to hold in trust for petitioner/respondent in trust for herself and her children

a. SWM -Son

b. AWM -Daughter

c. MWM -Daughter

d. G M -Daughter

(ii) 0.36 Ha to be registered in the joint names of protesters, Mary Wairimu Mwaniki, Eunice Wangui Gatimu, their mother Purity Muthoni and their sister Tabitha Wanjugu Kiraya.

(iii) Costs in the cause.

Signed, Delivered and Dated at Nyeri this 23rd day of May 2019.

Mumbua T Matheka

Judge

In the presence of:

Ms. Mwangi for applicant

Mr. G. Mwangi for petitioners: - I pray for Right of Appeal within 30 days.

Court- Right of Appeal granted within 30 days.

Alice Wairimu

Lydia Wamuyu

Eunice Wangui

Tabitha Wanjugu

Mary Wairimu

Judge