



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC. CAUSE NO. 409 OF 2007

IN THE MATTER OF THE ESTATE OF SEBASTIAN MBWIRI KIERE- DECEASED

LYDIA KARIMI.....1ST APPLICANT

EDWARD MWIRIGI MBWIRI.....2ND APPLICANT

VERSUS

JOANNA KAIMURI MBWIRIA.....1ST PETITIONER/RESPONDENT

JULIA MUGURE MBWIRIA.....2ND PETITIONER/RESPONDENT

CHRISTINE MUKIRI.....RESPONDENT

RULING

1. Before me is summon for Revocation and Annulment of Grant dated 22nd July 2011. It seeks

i. Revocation or Annulment of grant of letters of Administration to Joanna Kaimuri Mbwiria and Julia Mugure Mbwiria made on 10th March 2008 and confirmed on 16th September 2009.

ii. Costs for the application

2. The application was premised on the grounds set out in the application and the supporting affidavit and further supporting affidavit of Lydia Karimi and Edward Mwirigi Mbwiri where it was stated in brief:

a. That the petitioners/respondents concealed/ failed to disclose that they were dependents of the deceased estate being the deceased 3rd wife and son respectively.

b. That the 1st applicant was married to the deceased.

c. That the petitioner/respondents concealed that the deceased also had three sisters who were the deceased dependents namely Janet Nkirote, Hellen Mwari and Esther Ncheri.

d. That the petitioners failed to disclose that the deceased prior to his death, sold some portions of land to third parties and particularly to Paul Kiogora and Gerald Mbaabu M'Ikunyua.

e. That the petitioners/respondents filed this cause secretly and without the consultation of all the dependents of the deceased estate with clear intent to defraud and disinherit

f. That they filed another petition for Grant of letters of administration being MERU HCC SUCCESSION CAUSE NO. 484 OF 2007 which a grant was made to them on 2nd July 2009 and is pending confirmation.

3. This application was opposed by Joanina Kaimuri who filled an affidavit on 13th October 2011. She averred that she is the first wife to the deceased having entered into a statutory marriage in 1967. Lydia Karimi is not a widow to the deceased because during the subsistence of the

marriage the deceased only got involved with the 2nd respondent as she was accepted as the 2nd wife as Kimeru Customary rites, practices and traditions were performed. To the best of her knowledge the 1st applicant is the wife of one Edward Mugambi of Chugu in Imenti North District who has 6 issues non belonging to her deceased husband. The second applicant herein grew up as her son since he was born out of wedlock and he was brought to her when he was very young. The 2nd applicant has constructed on L.MIKUMBUNE/691 and he is entitled to 1.30 hectares.

4. This application was heard vide viva voce evidence where **OW1 LYDIA KARIMI** testified and adopted her statement dated 24th July 2017 where she indicated that the grant of letters of administration issued on 16th April 2007 was obtained unlawfully and fraudulently as the petition filed this succession cause was in total secrecy and in total exclusion of the deceased's rightful beneficiaries. There was concealment of the fact that Janet Nkirote, Hellen Mwari and Esther Ncheri who are sisters of the deceased were also his dependents. In addition they did not disclose that prior to the deceased death he sold some portions of land to third parties, Paul Kiogora and Gerald Mbaabu M'Ikunyua whose interest should be taken into account in the distribution of the estate. The 1st and 2nd applicants had filed another petition for grant of letters of administration being MERU HCC SUCCESSION CAUSE NO. 484 OF 2007 and which a grant was made to them on 2nd July 2009. They only became aware of the proceeding herein when the petitioners/respondents sent surveyors to the deceased's property and particularly to the plot where the 1st applicant herein resides and which plot had been bequeathed to the 1st applicant by the deceased prior to his death.

5. **OW1** further stated that although the deceased had never been legally separated or divorced from the 1st respondent/petitioner they lived separate lives and were living on separate parcels of land belonging to the deceased. The deceased herein married her in the year 1992 under the Kimeru Customs and they had four issues namely Betty Kagwiria, Mercy Gakii, Rose Wanja and Moreen Gatweri. OW1 was already divorced to Edward Mugambi under the norms, dictates and customs of the ameru people before she was married to the deceased. She had two issues in her former marriage who were left with their father and are not claiming any share of the deceased estate. That although the 1st petitioner/respondent claimed that the 2nd applicant is entitled to 1.30 ha of L.MIKUMBUNE/691, in her application for confirmation of grant she never gave him a share. During cross examination OW1 indicated that when she married the deceased no ceremony was conducted but dowry was paid.

6. **OW2 EDWARD MURUGI** adopted into evidence the statement he made on 24th July 2017 where he stated that he is the eldest son of the deceased. The deceased gave him LR NO. NKUENE/L-MIKUMBUNE/691 which he occupies to date. The petitioner herein filed this cause secretly and went to the extent of getting a chiefs letter in another location. The P&A 5 form did not include OW1 as the deceased survivor. Additionally in the confirmation of grant he was excluded from the list of deceased children and the petitioners did not seek his consent in the mode of distribution. OW2 confirmed that the OW1 is the deceased wife and that he personally knows that the deceased married OW1 as per Kimeru Customary Law. However during cross-examination OW2 admitted that he was not present for the ceremony where the deceased married OW1. Additionally he mentioned that Esther Ncheri who was the deceased sister has since passed away and that he is not aware if they depended on the deceased.

7. **OW3 GEORGE MUNENE** also adopted his statement made on 24th July 2017 where he stated that he is a cousin to the deceased. OW3 recalled that when the deceased married his first wife he accompanied him during courtship and during the rites of marriage. He was also present when the deceased paid dowry to OW1 parents. The 2nd petitioner who is the deceased 2nd wife deserted her matrimonial home and left behind her young children who were taken care of by OW1. The dispute over the deceased estate arose when the deceased wanted to share his properties and both the petitioners and their children resisted the move.

8. **PW1 JOANINA KAIMURI MBWIRIA** testified and told the court that she is the deceased 1st wife. She adopted a statement dated 22nd December 2017. Where she stated that the 2nd petitioner is her co-wife. OW2 was given LR NO. NKUENE/L/MIKUMBUNE/694 and is exclusively utilizing it and was fully involved in every step of this proceedings. PW1 additionally stated that OW1 was never married to the deceased and is a total stranger to the estate. The deceased did not cohabit with her nor did he have any children with her. OW1 is a tenant on two rental premises on LR. NO. NKUENE/TAITA/2272 situated in nkubu town. She became a tenant after the demise of the deceased. The two rental premises were let to her by M'Inoti M;Bagine Guciumia (deceased) and Cypriano Kimathi who co-owned the original LR. NO. NKUENE/TAITA/403 with the deceased. When need arose the petitioner sold the deceased share to Christine Mukiri for Ksh. 2,500,000. OW1 then became a Christine's tenant and paid her rent for 3 months at the rate of Ksh. 1,500 per room per month. Later she defaulted and Christine then took steps to recover rent.

9. **PW1** additionally stated that the deceased sisters were not dependent on the deceased and in fact two are happily married and Esther Ncheri who was also married is long dead. During cross examination PW1 stated that she was not aware that there was an order inhibiting transactions on assets of the deceased dated 24th August 2011 however it was registered by the land registrar. The green card shows that Christine was registered on 2nd August 2012.

10. **PW2 Christine Mukiri, PW3 Julia Mugure and PW4 Alice Karuku** also testified and adopted their statements made on 22nd December 2017 where they reiterated the statements of PW1

11. I have carefully perused through the applications, affidavits, submissions and the record it entirety and the issue for determination before this court is **whether to annul/revoke the grant of letters of Administration issued to Joanna Kaimuri Mbwiria and Julia Mugure Mbwiria made on 10th March 2008 and confirmed on 16th September 2009?**

12. Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya provides the threshold for revocation or annulment of grant. It states as follows:

76. Revocation or annulment of grant

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) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

ii. to proceed diligently with the administration of the estate; or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

iv. that the grant has become useless and inoperative through subsequent circumstances.

13. The petitioner/respondent herein argued in their submissions that the 1st applicant is not a widow of the deceased as the essentials of a valid kimeru customary marriage were not met. According to the witnesses provided by the 1st applicant only dowry was paid and there were no marriage negotiations. The respondents relied on **Dolly Wanja Ngit vs Irene Gakii Mbijiwe (2014) eKLR** in support.

14. However, In **Re Estate of Morris Kilonzo Musyimi (deceased) [2018] eKLR** Odunga J held;

“52. In this case, it was averred by the Respondent and not disputed by the Applicant that there was a long cohabitation between the Respondent and the deceased spanning over two decades and by the time of the death of the deceased, he had sired 8 children with the Respondent. It was deposed that the deceased in fact built a family house for his 2nd family and the Respondent moved in which is todate her place of abode. It was deposed that the said children considered the Applicant as their mother and the Applicant likewise treated them as her children being the children of the deceased. There is no evidence that the Applicant raised any issue with the said relationship during the deceased’s lifetime.

53. In Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie (supra), the Court found that:

“Evidence was adduced in the court below that the petitioner and the deceased had three children and she was living with him at the time of his death. Evidence was adduced to the effect that the deceased was paying the rent for the house the petitioner was living in with her children. Besides, several witnesses testified that during the deceased’s lifetime he was living with and treating the petitioner for all intents and purposes as a wife. It is no wonder, therefore, that the deceased specifically told the objector that the children he had with the petitioner were his children and needed to be given a share of his estate. It is not in the common and natural course of human conduct to accept children he has fathered with another woman but reject their mother unless for good reason and on the contrary the evidence that the deceased and his family had no problem with the petitioner.”

54. It is therefore my view and I hold that such a long cohabitation coupled with the resultant issues of the said cohabitation, the conduct of the deceased can only lead to the conclusion that the deceased and the Respondent intended that they be presumed to be husband and wife and this Court ought not to put their desires asunder.

55. Having so found section 3(5) of the Law of Succession Act must come into play and I declare the Respondent a wife for the purposes of the Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of the said Act.”

15. Similarly, in this case the marriage between the 1st applicant and the deceased may not have satisfied the elements of a valid Kimeru customary marriage but from the witness testimonies they lived as husband and wife and their cohabitation resulted in issues Mercy Gakii, Rosa Wanja and Moreen Gatwiri as evidenced by their birth certificates. Therefore, we can infer that they intended to be presumed husband and wife. Consequently section 3(5) of the Law of Succession act comes into play.

16. In **SAMUEL WAFULA WASIKE -vs- HUDSON SIMIYU WAFULA CA NO.161 OF 1993**) Kwach, Omolo and Tunoi JJA held that:-

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

In this case not all the dependents of the deceased were disclosed particularly Edward Mwirigi who is acknowledged as the deceased son out of wedlock was not included as a beneficiary in the certificate of confirmation of grant dated 24th September 2009. From the letter from the assistant chief of Kigane location dated 11th July 2007 and addressed to the District Officer of Nkuene division, it apparent that the petitioner and the applicants were not agreeing from the very beginning on who was and who was not a dependent of the deceased person herein. When the petitioners filed the petition mherein no. 409 of 2007 the applicants on the other hand filed Succ No. 484 of 2007 which were running concurrently until the applicant realized that the petitioners had gone ahead of her to obtain confirmation of grant in their cause that she filed an application to revoke the said grant. Succession cause no. 484 of 2007 is still pending and it is prudent that the same be closed as it relates to the same deceased person as in the current cause. This court therefore finds that there was concealment of material facts in obtaining the grant. The grounds for revocation of grant have been satisfied as provided under section 76 under the Law of Succession Act and the application of the applicants Lydia Kirimi and Edward Mwirigi is allowed.

i. The grant issued on 10th March 2008 and confirmed on 16th September 2009 is hereby revoked

ii. That a fresh grant of letters of administration are issued to LYDIA KARIMI, JOANNA KAIMURI MBWIRIA and JULIA MUGURE MBWIRIA.

iii. The new administrators shall file summons for distribution of the estate and serve upon all the beneficiaries within 21 days from today's date i.e. 18th of July 2019

iv. Upon service of the summons for distribution any party who is not agreeable to the mode of distribution shall have 14 days within which to file and serve affidavit of protest i.e. 1st August 2019

v. Mention 1st August 2019 to confirm compliance and take directions.

HON A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 27TH DAY OF JUNE 2019.

IN THE PRESENCE OF:

C/A: Mr Mwirigi advocate for applicant

APPLICANT

1ST RESPONDENT Mr Munene Advocate holding brief for Mbaabu for petitioner

2ND RESPONDENT

HON A.ONG'INJO

JUDGE

Mr Mwirigi Advocate

We have an application to make. There was property that was transferred to Christine Mukiri, a daughter of the deceased. We pray that it reverts to the name of the deceased for purposes of distributional

Order

The consequence of revoking grant is that all transactions arising there from are nullified. The assets to revert to the name of deceased.

HON A.ONG'INJO

JUDGE