



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 327 OF 2006

IN THE MATTER OF THE ESTATE OF HANNA GATHONI KOMBANI (DECEASED)

LUCY WANJIRU KIMANI.....APPLICANT

VERSUS

SIMON NJOROGE KOMBANI.....RESPONDENT

JUDGEMENT

1. By way of a summons for revocation of grant dated 17/8/12, Lucy Wanjiru Kimani (Lucy) seeks orders;

1. That this court be pleased to revoke and/or annul the Grant of letters of administration intestate issued to Simon Njoroge Kombani on the 9/10/06 and the certificate of confirmation issued on the 2/11/07 and proceed to order that the applicant and her family be included in the list of beneficiaries of the Estate of Hannah Gathoni Kombani.

2. That the costs of the application be provided for.

2. The application is premised on three grounds as seen on the face thereof, namely;

a) That the grant issued to Agnes Moraa Peter and duly confirmed on 8th December 2016 is hereby revoked;

b) A fresh grant shall issue to Agnes Moraa Peter and Alloys Mosioma Nyamari;

c) For the avoidance of doubt Central Kitutu/Mwabundusi/96 shall revert to the name of the deceased and the County land Registrar is directed to cancel all other entries on the register to comply with this order

3. It is further supported by Lucy's affidavit sworn on the 17/8/12.

4. The application is opposed and Simon Njoroge Kombani (the petitioner) has sworn a replying affidavit sworn on 1st February 2013.

5. The matter was disposed off by way of oral evidence.

6. It is Lucy's case from the evidence on record that she was married to one Peter Mbugua Kibathi, a grandson to the deceased with whom they had six children.

7. Lucy accuses the petitioner of failing to include her as a beneficiary to the estate together with her children. The petitioner is a son to the deceased.

8. It is the further evidence of Lucy that she lived on the subject land being Plot No. 1871 which belonged to the deceased. Her husband was buried there as well as her parents in law and others.

9. PW 2 testified that the subject land belonged to the deceased. She confirmed that Lucy is wife to Peter Mbugua (deceased) son of Joshua Kibathi Kombani (a deceased son of the deceased herein).

10. On his part, the petitioner testified that the deceased had six children. He lives on a parcel of land No. 1870. He bought this land through shares acquired in Ngwataniro Company which shares included parcel No. 1871. He produced a share certificate dated 14/6/73 for parcel 1870 and dated 7/3/73 for parcel 1871 in the names Njoroge Kombani (i.e himself).

11. He also produced a bundle of receipts in respect of payment for parcel 1870.
12. He added that he registered the shares in respect of 1871 in the names of the deceased since an individual was not allowed to hold two shares.
13. The petitioner referred to some proceedings before the Chief relating to the land in dispute in which the Chief determined that the land belonged to him (the petitioner). He urges that only Lucy is laying a claim to this land. All his other siblings and their children are not laying any claim. This, yet she has land at Laare and Eburu.
14. The petitioner acknowledges that Peter Mbugua Kibathi, the husband to Lucy is a grandson of the deceased and that Joshua the father to Peter Mbugua Kibathi was entitled to inherit from the deceased.
15. He added that he bought the land from Mutukanio Ngwataniro Company. This company was the same as Nakuru Mutukanio Company.
16. Under cross-examination, the petitioner admitted that a receipt Serial No. 6382 dated 25/11/74 had an "X" mark. It is supposed to be in respect of parcel No. 1871, yet the share certificate for land parcel 1871 is dated 7/3/73 i.e before receipt was issued. The receipt shows it is issued by Elburgon Farmers Ngwataniro.
17. Another receipt said to be in respect of parcel No. 1871 is receipt No. 12323. It is dated 14/6/82. It is for Plot No. 2156, Njoro. It has an "X" mark and written 1871. It is issued by Nakuru Mutukanio Company. Same applied to receipt No. 3881 dated 16/3/72 issued by Elburgon Farmers Ngwataniro.
18. Further cross examined, the petitioner acknowledged that several relatives including the husband to Lucy are buried on the land.
19. On re-exam, the petitioner explained the "X" mark as one put on a receipt to show that land had been allocated to that person.
20. I have had occasion to consider the summons for revocation of grant, the grounds relied on and the affidavit in support. I have considered the replying affidavit. I have further had the advantage of having the exposition of the issues herein through the oral evidence and exhibits produced.
21. Of determination is whether the applicant herein has achieved the threshold of revocation envisaged under S.76 of the Law of Succession Act and specifically to answer the following questions;
 1. Whether the petitioner/respondent concealed something material or made a false statement to the court when seeking a grant of letters of administration.
 2. Whether the proceedings to obtain the grant were defective in substance.
 3. Whether the claim to ownership of the subject land is sustainable in these proceedings, and if so whether same has been proved.
22. **Section 51 of the Law of Succession Act** provides as follows;

"S. 51 (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to—

 - (a) the full names of the deceased;*
 - (b) the date and place of his death;*
 - (c) his last known place of residence;*
 - (d) the relationship (if any) of the applicant to the deceased;*
 - (e) whether or not the deceased left a valid will;*
 - (f) the present addresses of any executors appointed by any such valid will;*
 - (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;***
 - (h) a full inventory of all the assets and liabilities of the deceased; and*
 - (i) such other matters as may be prescribed."*

23. For our purposes section 51(2)(g) is the relevant part. Under this provision the petitioner was obligated by Law to name among other persons the children of the deceased children of the deceased. Such a child would have included Peter Mbugua Kibathi.

24. In the form P & A 5 lodged in court by the petitioner, the petitioner only named himself, Tabitha Kabui and Tabitha Wanjiru as the only survivors of the deceased.

25. By failing to comply with the Law (Section 51 (1) & (2) of the Law of Succession Act, the petitioner rendered the proceedings defective, in substance.

26. The failure in the same vein amounts to material non-disclosure and the making of a false statement which are enough under section 76(h) of the Law of Succession Act to warrant an order for the revocation or annulment of the grant.

27. That concealment appears to have been a well calculated and deliberate move to mislead the court. This is affirmed by a cursory look at the letter by Chief Joseph Wachira of Kihingo Location dated 17/5/06 where the Chief states;

“The deceased was survived by his son Simon Njoroge Kombani and this office would be grateful to any assistance that could be accorded to her by your good office.”

28. This letter goes further to contradict even the petitioner’s own assertion in the P & A 5 that there were two other survivors of the deceased. So, what was the truth? No doubt there appears to have been a calculated move to mislead the court all the way from the outset.

29. This leads me to the last issue for determination being whether the claim to ownership of the subject land by the petitioner is sustainable in these proceedings and if so whether the same has been proved.

30. As a preamble, it would be a good starting point to lay down the “*raison detre*” for succession proceedings.

31. The object of the Law of Succession Act is clearly spelt out as;

“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto.”

32. In my understanding, that object cannot include the filing of a succession cause to lay a proprietary interest on the estate or part thereof.

33. And that is exactly what the petitioner did in this matter. Whereas he acknowledges that land parcel Rare/Teret Block I/1871 was registered in the names of the deceased as at the time of her death, a fact confirmed by the certificate of official search dated 31/5/06, he proceeded to file the petition for letters of administration to have the land transmit to him under the reason that the land was his as he had bought it.

34. Such a claim is not sustainable in Law through proceedings under the Law of Succession Act.

35. Whereas the court has the jurisdiction to entertain issues connected to intestate or testamentary succession e.g provision for creditors who would include parties who had purchased property from the deceased but the process was not completed in the lifetime of the deceased, such a claim as laid herein by the petitioner is illegal.

36. The petitioner needed to initiate proceedings to separate his property from that of the deceased. This he would have done through an appropriate claim before the Environment and Land Court against the administrator(s) of the estate of the deceased.

37. There existed a discernable conflict of interest when the petitioner purported to take out letters of administration in respect of the estate of the deceased and at the same time lay a claim of ownership to the same estate. This runs contrary to the clear provisions of the powers, duties and obligations of an administrator as espoused in **Sections 82 and 83** of the **Law of Succession Act**.

38. By his very act, the petitioner purported to initiate a claim to land suit through the succession proceedings.

39. Ibrahim J (as then was) in re ***Estate of Kimani Kinuthia (Deceased)*** had this to say on a similar situation;

“Secondly, I do not think that these succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of a trust. This is not the function of a Succession Court where the claimant is neither a beneficiary or a dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an estate by third parties.”

40. This position and which I agree with entirely is fortified by the words of Musyoka J in the ***Estate of Javan (2014)eKLR*** also stated;

“It is not in dispute that the deceased was the registered proprietor of the property in question. His registration as such was not disputed until after his death. The registration in question was under the Registered Land Act Cap 300 Laws of Kenya (now repealed). It was a first registration. By dint of Section 143 of the Registered Land Act, the said registration cannot be faulted.

There is Judicial authority on this in Obiero –vs- Opiyo & Others (1972)E.A 227 where it was held that a registration is indefeasible even if fraud is proved. There is therefore no merit in the applicant’s case. Even if she had a case that there existed a trust in her mother’s favour, the same ought to be established in a suit before the Environment and Land Court.”

41. A passage from the Judgement of Musyoka J. **in the matter of the estate of Mbai Wainaina (Deceased)** would be appropriate at this stage to emphasize the jurisdiction of the probate court. He said;

“The applicant’s claim that Kiganjo/Gachika/460 was held by the deceased in trust for them and therefore that makes them heirs to his estate. Whether the deceased held Kiganjo/Gachika/460 in trust for the applicants is a matter of both fact and Law. It is incumbent upon the applicants to establish that such a trust did exist. The issue is whether the applicants have provided material upon which I can conclude whether such trust existed or not. I have not seen material from what was deposed in the affidavit sworn on 17th April 2012 by John Ng’ang’a Wainaina in support of the application.

Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

42. Even if, for a moment, this court was to entertain the claim of ownership of the land by the petitioner, the evidence adduced in support thereof is of the weakest nature.

43. The receipts produced for the purported purchase are issued by different entities viz Ngwataniro Mutukano Company, Nakuru Ngwataniro Company and Elburgon Farmers Ngwataniro Company. The nexus between these companies and the parcel of land No. 1871 is hazy. The evidence on record does not bring clarity on how these receipts are connected and further whether they were in respect of purchase of the same land.

44. The evidence on record also raises considerable inconsistencies and contradictions. Some of the receipts are shown to have been issued after a share certificate had already been issued. No plausible explanation was forthcoming to clear the air.

45. Bizarre situations e.g where the share certificate in respect of parcel No. 1871 is issued in 1973 yet the petitioner produces a receipt No. 4428 for payment of the share certificate on 14/6/82 much later after 1973 are not explained.

46. Further, the fact that other relatives of the petitioner including the husband of Lucy mentioned are buried on this land pours cold water on the petitioner’s claim of ownership and coupled by the fact that the petitioner demonstrates no action to reclaim “his” land, from the deceased during her lifetime renders his claim weak and unsubstantiated.

47. On a balance of probability, even if the court would have assumed jurisdiction, the petitioner fails to prove his claim on a balance of probability.

48. With the result that for the reasons above stated, I am satisfied that the grant herein was obtained through proceedings that were defective in substance, there was the making of a false statement and concealment from the court of something material to the case and the petitioner has failed to prove ownership of the land forming the estate herein.

49. The applicant has met the threshold for the revocation of the grant herein. I allow the summons and make the following orders;

1. The grant issued to Simon Njoroge Kombani on the 9/10/06 and confirmed on the 2/11/07 is revoked.
2. A fresh grant of administration be and is hereby issued to Simon Njoroge Kombani and Lucy Wanjiru Kombani jointly.
3. The grant in 2 above is confirmed in the following terms;

Schedule of Property	Beneficiary
Rare/Teret Block I/1871	Simon Njoroge Kombani
	½ Share
	Lucy Wanjiru Kimani
	½ Share on her behalf and
	in trust for her children.

4. Each party to bear its own costs.

Dated and Signed at Kisii this 18th day of October 2019.

A.K NDUNG'U

JUDGE

Delivered at Nakuru this 30th day of October 2019.

R. NG'ETICH

JUDGE