



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1131 OF 1991

IN THE MATTER OF THE ESTATE OF THE LATE WILLIAM KUNG'U NDWARU (DECEASED)

JUDGMENT

1. The cause herein is with regard to the estate of the late William Kung'u Ndwaru. On the 27th January 1994, letters of administration intestate were granted to Florence Wambui Kung'u and Gabriel Kinyanjui Ndwaru. Gabriel Kinyanjui died and the grant was amended to leave Florence Wambui Kung'u as the sole administrator of the estate. The estate of the deceased comprised of the following assets:

- (a) Dagoretti/Riruta/10 measuring 7.84 acres or thereabouts;
- (b) Dagoretti/Riruta/108 - measuring 2.28 acres or thereabouts; and
- (c) Nzambani/Kyanika/2198 - measuring 4 acres or thereabouts.

2. The grant was confirmed on 3rd March 1999, where the court distributed Dagoretti/Riruta/10 as follows:

- (a) Portions A and C were to be registered in the name of Florence Wambui Ndwaru, on her own behalf and in trust for John Ndwaru, Peter Nguku, Susan Njeri and George Chege, in equal shares;
- (b) Portion B - half an acre each was to be transferred to Stephen Kamuyu Ndwaru and Esther Nyiha Ndwaru, with the balance being registered in the names of Florence Wambui Ndwaru, on her own behalf and in trust for John Ndwaru, Peter Nguku, Susan Njeri and George Chege, in equal shares; and
- (c) Portion D - one (1) acre was to be registered in the name of Charles Muchemi Ikunya upon completion of the purchase price.

3. In a ruling delivered on the 13th March 2003, the court clarified that the portion due to Florence Wambui Ndwaru was to be located where the borehole was constructed and that she was to complete administration of the estate. The rest of the estate remained undistributed. An application, dated 2nd November 2004, was lodged herein by Peter Nguku Kung'u and Susan Njeri Kung'u, hereafter to be referred to as the 2nd and 3rd respondents, seeking for review on the orders of 13th March 2003, on grounds that Charles Muchemi Ikunya was a purchaser and thus not a beneficiary of the estate. The same was determined by court, it was disallowed.

4. I am tasked with determining four applications. The first application was filed by Stephen Kamuyu Ndwaru, who I shall hereafter refer to as the 5th respondent. It is dated the 17th January 2017 and seeks rectification of the grant to reflect him and the 2nd Respondent as administrators in the place of their mother, Florence Wambui Ndwaru, who has since passed on. The application is opposed by the 2nd respondent who holds the view that the 5th and 6th respondents are stepchildren to the deceased and therefore unqualified administer the estate. He offers to administer the estate of the deceased as the legitimate son. The second application was filed by Teresia Waceke Kariuki, Elizabeth Wanjiku Chege and Jane Muthoni Makori, who I shall refer hereto as the applicants. It is dated 17th February 2017 and seeks revocation of the grant confirmed on the 3rd March 1999, on the basis that the administrators had not include them as beneficiaries to the estate of the deceased, and they were, as a consequence, denied entitlement in Dagoretti/Riruta/10. The third application was filed by the 2nd respondent and is dated 17th February 2017. It seeks that the 5th and 6th respondents be struck out of the list of beneficiaries and that they relinquish their interests in Dagoretti/Riruta/10 on the grounds that they were stepchildren, and therefore not entitled to benefit. He also proposes that he and the applicants be included as beneficiaries of the estate. The fourth application is also brought at the instance of the 2nd respondent, and it is dated 28th February 2017. In it, the 2nd respondent seeks to have the grant confirmed on the 3rd March 1999 revoked as it included the 2nd and the 6th respondents as beneficiaries yet they were not. He also seeks to be appointed as the sole administrator of the estate of the deceased.

5. Directions on the matter were taken on the 31st July 2017, when it was ordered that all four applications be determined simultaneously, by way of *viva voce* evidence. The oral hearings happened shortly thereafter.

6. Peter Nguku Kung'u, the 2nd respondent, a son to the deceased testified that the deceased was married to Salome Wanjiku Kung'u and Florence Wambui Kung'u, who was his mother. He testified that Stephen Kamuyu Ndwaru and Esther Nyiha Ndwaru, the 5th and 6th respondents were the deceased's stepchildren. He stated that when the deceased married their mother Salome Wanjiku Kung'u, she had had the two children from a previous marriage and that they lived with them. He also stated that his sisters, the applicants, had been excluded as beneficiaries in the estate, and yet, they were entitled to benefit from the estate as well. During cross-examination, he confirmed that the deceased was married to Salome Wanjiku Kung'u and that the deceased did not have any children with the said Salome Wanjiku Kung'u. He stated that Charles Muchemi Ikunya, the 7th respondent, was a purchaser. He stated that Dagoretti/Riruta/10 had been charged to a bank and that the deceased had defaulted in making payments, and that the bank had threatened to sell the property. The 7th Respondent was approached and he agreed to buy part of the estate, and the purchase money was used to offset the loan and secure the property.

7. Jane Muthoni Makori, the 4th applicant, testified that she was a daughter of the deceased. She stated that she and her sisters, the other applicants, had been excluded from the list of beneficiaries, and she prayed that the grant be revoked. She stated that she had not been aware of the succession proceedings. During cross-examination, she stated that when she signed a consent document relating to the case, she was green and did not understand the document. She stated that the deceased had two wives, the first house had two children and the second house had eight children. Mary Waruguru Mucheru, the 3rd applicant, testified, and, in the course of her testimony, renounced her interests in the estate.

8. Charles Muchemi Ikunya, the 7th respondent, testified that he had been approached by the administrators of the estate and requested to buy part of Dagoretti/Riruta/10 which belonged to the deceased. He stated that he agreed and bought an acre in the parcel for Kshs. 2, 200, 000.00, part of which was used by the administrators to offset a loan for which the land had been charged. He stated that the purchase helped secure the deceased's property which the bank wanted to sell. During cross-examination, he confirmed that he bought the land from the administrators of the estate.

9. Stephen Kamuyu Ndwaru, the 5th respondent testified that he was a son to the deceased, born of the deceased's first wife, Salome Wanjiku Kung'u. He stated that the deceased had two wives, Salome Wanjiku Kung'u and Florence Wambui Kung'u. He produced his birth certificate and that of his sister, Esther Nyiha Ndwaru, the 6th respondent. He stated that he and his sister were the eldest children of the deceased, and that they ought to benefit from the estate. During cross-examination, he confirmed that the 7th respondent was entitled to the one acre that he had bought from the estate. He also acknowledged the applicants' interests and was agreeable to have them included as beneficiaries.

10. Susan Njeri Kung'u, the 3rd respondent, testified that the deceased was her father and Florence Wambui was her mother. She said that she was entitled to be included as a beneficiary. She stated that the 2nd respondent, her blood brother, was unfit to administer the estate as he had harassed her over their mother's estate. She stated that the 5th respondent was well suited to administer the estate. She also stated that she did know why the applicants were not included in the distribution. During cross-examination, she confirmed that she not did not want the 2nd respondent to administer the estate as he was not fair to her and had hit her severally. She also was against the revocation of the grant as she was of the view that the distribution of 3rd March, 1991 was fair.

11. The parties were directed to file written submissions, and they complied. The applicants hold the view that they were entitled to inherit from their father's estate. They prayed that the grant be revoked. The 2nd respondent equally prays that the grant be revoked on the grounds that the 5th and 6th respondents are not beneficiaries and are, therefore, not entitled to benefit as beneficiaries. He also prays to be appointed as the administrator of the estate considering the fact that he is a biological son to the deceased. The 5th respondent on his part prays to be appointed as the administrator of the estate. He submits that the applicants are entitled to the estate as the parcel was big enough to accommodate them. He also asks the court to consider the fact that some of the beneficiaries had sold part of their entitlement in the estate and also the fact that there was an innocent purchaser in the estate, being the 7th respondent.

12. From the applications, affidavits, oral testimonies and the written submissions, the issues for determination that I have identified are as follows:

- a) who are the beneficiaries of the estate of the deceased;
- b) whether the grant made on the 3rd March 1999 should be revoked; and
- c) who should be appointed administrators of the estate of the deceased.

13. Let me start with the first issue, who are the correct survivors of the deceased, or, put differently, who should be the beneficiaries of the estate of the deceased. From the evidence it is clear that the deceased had two wives. The first being Salome Wanjiku Kung'u and the second was Florence Wambui Kung'u. From the evidence it has been agreed that the children of Florence Wambui Kung'u are Teresia Waceke Kariuki, Elizabeth Wanjiku Chege, Mary Waruguru Mucheru, Jane Muthoni Makori, John Ndwaru Kung'u, Peter Nguku Kung'u, Susan Njeri Kung'u and George Chege Kung'u. The 5th respondent testified that he and the 6th respondent are children of the deceased born of his first wife, Salome Wambui Kung'u. The 2nd respondent, however, disputes the fact stating that the two are the deceased's stepchildren. The 5th respondent in his response produced as evidence copy of a birth certificate to prove that the deceased was his father. It should be noted that the applicants herein do acknowledge them as their brother and do not support the views of the 2nd respondent.

14. In *In Re Estate of Patrick Mwangi Wathiga - Deceased* [2015] eKLR it was stated that:

"It is trite law that the burden of establishing all the allegations rested on the objector and in law he was under an obligation to discharge the said burden. It's not enough to state that the deceased was his father. He ought to have supported the said allegation

by adducing the necessary supporting evidence. This court in *Lewis Karungu Waruiro Vs Moses Muriuki Muchiri* [6] held that: -

"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA vs Edmunds* [7] remarked: -

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by *Rajah JA in Bristone Pte Ltd vs Smith & Associates Far East Ltd* [8]: -

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person."

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. [9] The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*, [10] Lord Denning said the following about the standard of proof in civil cases: -

'The ... {standard of proof} ...is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist."

15. Apart from the lengthy submissions on how the 5th and 6th respondents were not biological children of the deceased, the 2nd respondent has offered no evidence in support of his claim save for the fact that the chief's letter indicated that the two were stepchildren. He also relies on the evidence of his mother, Florence Wambui Kung'u, in the instant suit, where she testified that the two, 5th and 6th respondents, were not sired by the deceased. It should be noted that Githinji J., in his ruling confirming the grant, delivered on the 3rd March 1999, held that:

"Although Florence Wambui testified that the two children of Salome Wanjiku were not fathered by the deceased, she nevertheless states that she recognizes them as children of the deceased. In any case the overwhelming evidence is that they are the children of the deceased..."

16. I am, however, alive to the decisions in *In Re Estate of Tonkei Jeremiah alias Jeremiah Kaurrai Koin Tonkei (Deceased)* [2019] eKLR and *In re Estate of Maxwell Mwangi Mwaniki (Deceased)* [2019] eKLR, that a certificate of birth is not adequate proof of paternity. In the instant cause, all parties herein acknowledge that the 5th and the 6th respondents are the children to the deceased. The 2nd respondent confirms that the two were living with their mother during the subsistence of her marriage to the deceased. It is my finding that the evidence, coupled with the birth certificate, is sufficient proof that the 5th and 6th respondents are indeed children to the deceased, and, therefore, entitled to benefit from the estate. In any event this issue is water under the bridge in view of the ruling of Githinji J. of 3rd March 1991.

17. I now turn to the issue as to whether the grant herein should be revoked. When determining issues of revocation and annulment of grants, the courts are guided by the provisions of section 76 of the Law of Succession Act, which provides as follows: -

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 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 has ordered or allowed; 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 has produced any such inventory or account which is false in any material particular; or

(d) *The grant has become useless and inoperative through subsequent circumstances.*”

18. In *Jesse Karaya Gatimu vs. Mary Wanjiku Githinji* [2014] eKLR, the court was of the view that;

“The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.”

19. The Court of Appeal, in *Matheka and Another vs. Matheka* (2005) 2 KLR 455, laid down the following guiding principles:

“(i)A grant may be revoked either by application by an interested party or by the court on its own motion.

(ii)Even when the revocation is by the court upon its own motion, there

must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”

20. The same court affirmed that position in *Joyce Ngima Njeru & Another vs. Ann Wambeti Njue* [2012] eKLR, where it said that:

“The central core of the ingredients required to be established under section 76 of the L.S.A. is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the Grant or in active use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits”

(Also see *Mary Nyacomba Kinaro vs. Albert Mungana Philip* [2019] eKLR)

21. In evaluating the provisions of section 76 of the Law of Succession Act, the Court of Appeal, in *Nyaga Cottolengo Francis vs. Pius Mwaniki Karani* [2017] eKLR, stated that:

“The combined effect of the provisions of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case by case basis. The discretion exercisable is in terms unfettered but, of course, it must be guided by the law and reason but not whim or caprice.”

22. The applicants herein state that they are the daughters of the deceased. They state that while the grant indicated their siblings as beneficiaries they had been excluded and that there was no reason for the same. All parties herein agree that the applicants ought to have been included as beneficiaries, and there is no objection to the application. The Court of Appeal in *Cosimo Polcino vs. Tony Kent* [2014] eKLR, was of the view that

“... the fact that the appellant failed to disclose the existence of his two siblings, is sufficient ground to annul the grant resealed in Malindi Court on 17th November, 2009.”

23. In the cause herein, it is clear that the applicants, who are survivors of the deceased, were excluded and thus on that ground alone the grant ought to be revoked.

24. Let me now turn to the question of who should be appointed the administrator, or administrators, of the estate of the deceased. In determining who should be appointed as an administrator, the courts are guided by the provisions of section 66 of the Law of Succession Act, which provides as follows:

‘When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference

a) *Surviving spouse or spouses, with or without association of other beneficiaries;*

b) *Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided in Part V;*

c) *The Public Trustee; and*

d) *Creditors.'*

25. The courts have variously discussed the purport and effect of that provision in several decisions. In *In Re the Estate of Margaret Muringi Muhoro (Deceased)* it was observed that:

“The provisions of Section 66 of Act make the right of the children to administer the estate of their departed parents secondary to that of the surviving spouse of the deceased. The rights of other relatives rank even lower. However, the provision in Section 66 of the Act is not mandatory. The court is not bound by the order of preference set out in that provision. There is discretion, the court can overlook those with prior right and pick on a person lower down in the order of preference.”

26. The same was reiterated in *In Re Estate George Ragui Karanja (Deceased)* [2016] eKLR, that:

“The order of preference set out in section 66 of the Law of Succession Act is not binding to the court. It is discretionary. Section 66 refers to it as ‘a general guide.’ The court can appoint administrators without following the order of preference. Priority is given to surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in Part V of the Act, then the Public Trustee and creditors. The persons entitled in intestacy according to Part V, in their order of preference, include children (and grandchildren where their own parents are dead), parents, siblings, half-siblings and other relatives who are in the nearest degree of consanguinity up to and including the sixth degree.”

27. In *In Re Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR, the court remarked that:

“Section 66 of the Law of Succession Act, provides preference to be given to certain persons to administer deceased’s estate where the deceased died intestate and provides that the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the order of preference as set out in the aforesaid section.”

28. In this cause, the 2nd, 3rd and 5th respondents, have indicated willingness to administer the estate of the deceased. From the evidence on record, it is clear the 2nd and 5th respondents are not in good terms, and the 3rd respondent also deems him, the 2nd respondent, as unfit to administer the estate. Faced with a similar situation, the court in *Tabitha Wanjiku Mwangi vs. Anne Muthoni Njuguna & 4 Others* [2016] eKLR, observed that:

“In the instant case, the Court has final discretion to appoint administrator(s) but it should be in the best interests of all concerned. The Court must exercise judicial discretion based on law and pertinent facts. Unfortunately, since this matter proceeded on the basis of written submissions, this Court is not able to discern the pertinent facts in the absence of oral sworn evidence tested through cross examination. What is contained in the documents furnished to this Court is not subjected to cross examination and its veracity is lacking. This Court is unable to discern pertinent facts in the absence of oral sworn evidence by affidavits. Also, the pleadings depict a more entrenched dispute and what is presented is just but a tip of the iceberg. What this Court has discerned is that, the Objectors and Petitioner’s family are not on talking terms as deposed in the Objectors’ further submissions of 25th May, 2015. To appoint the 1st Objector as a Co-administrator with the Petitioner of the deceased’s estate in the present circumstances is a recipe for disaster.”

29. In the instant suit, it is clear that the parties that have proposed themselves to administer the estate do not get along and if they are left to administer the estate there will be conflicts. From the evidence, the deceased had two family units. From the first house, of Salome Wanjiku, I am persuaded that the 5th respondent is well suited to administer the estate. With regard to the second family unit, of Florence Wambui Kung’u, the 2nd respondent and the 3rd respondent, who have applied to be administrators do not get along. According to the 3rd respondent the 2nd respondent is a habitual drunk, who has mismanaged their mother’s estate and who has intimidated her during the process. The said claims have not been proved. However, it is clear that the two cannot, on their own would work, together in administering the estate. It is, therefore, in the best interests that the two work with their elder sister, Jane Muthoni Makori in administering the estate. It is my finding that the persons suited to administer the estate are Stephen Kamuyu Ndwaru, Peter Nguku Kung’u, Susan Njeri and Jane Muthoni Makori.

30. Having considered the facts of the case and the circumstances of the parties I am inclined to and I hereby make the following orders:

(a) that I reiterate the earlier findings by Githinji J. and hereby declare that Teresia Waceke Kariuki, Elizabeth Wanjiku Chege, Mary Waruguru Mucheru. Jane Muthoni Makori, John Ndwaru Kung’u, Peter Nguku Kung’u, George Chege Kung’u, Stephen Kamuyu Ndwaru, Esther Nyiha Ndwaru and Susan Njeri Kung’u are the survivors of the deceased and are the lawful beneficiaries of the said estate;

(b) that I reiterate the earlier finding by Githinji J. and declare that the 7th respondent Charles Muchemi Ikunya, is a *bona fide* creditor of the estate and is entitled to the portion of the land that he purchased from the estate;

(c) that the grant made and issued on the 27th January, 1994 and confirmed on 3rd March, 1999 is hereby revoked is hereby revoked;

(d) that Stephen Kamuyu Ndwaru, Peter Nguku Kung’u, Susan Njeri Kung’u and Jane Muthoni Makori are hereby appointed the administrators of the estate of the deceased;

(e) that a grant of letters of administration intestate shall issue to them accordingly;

(f) that I hereby forthwith order distribution of Dagoretti/Riruta/10 as follows:

(i) Portions A and C shall be shared equally between Teresia Waceke Kariuki, Elizabeth Wanjiku Chege, Jane Muthoni Makori, John Ndwaru Kung'u, Peter Nguku Kung'u, Susan Njeri Kung'u and George Chege Kung'u;

(ii) Portion B - half acre each to Stephen Kamuyu Ndwaru and Esther Nyiha Ndwaru, and the balance to be to be shared equally between Teresia Waceke Kariuki, Elizabeth Wanjiku Chege, Jane Muthoni Makori, John Ndwaru Kung'u, Peter Nguku Kung'u, Susan Njeri Kung'u and George Chege Kung'u; and

(iii) Portion D - one acre to Charles Muchemi Ikunya;

(g) that Dagoretti/Riruta/108 and Nzambani/Kyanika/2198 shall be shared equally between Teresia Waceke Kariuki, Elizabeth Wanjiku Chege, Jane Muthoni Makori, John Ndwaru Kung'u, Peter Nguku Kung'u, George Chege Kung'u, Stephen Kamuyu Ndwaru, Esther Nyiha Ndwaru and Susan Njeri Kung'u;

(h) that a certificate of confirmation of grant shall issue forthwith with respect to the property distributed in (f) and (g) above;

(i) that each party shall bear their own costs; and

(j) that any party aggrieved by the orders that I have made hereinabove is at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

DATED AND SIGNED AT KAKAMEGA THIS 15TH DAY OF October 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF October 2019

A . O MUCHELULE

JUDGE