REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 616 OF 2013

(IN THE MATTER OF THE ESTATE OF MITHAMO KIBINDU ALIAS GITARI KIBINDU)

HANNAH GATHIGIA MACHARIA.....ADMINISTRATRIX/RESPONDENT

VERSUS

LUCY GATHIGIA MAINA .....APPLICANT

JUDGMENT

The deceased in this cause died in 1976 while domiciled in the Republic of Kenya. He resided at Peter Ciira location at Karatina in Nyeri County.

The grant of letters of administration intestate in respect of his estate was made to the respondent on 4 February 2014; the respondent is one of the deceased's children who survived him. According to the affidavit in support of the petition, the rest of the deceased's survivors are named as follows:

1. Grace Wamuyu Karanja (daughter)

2. Lucy Gathigia Maina (daughter-in-law)

3. Joseph Ngatia(grandson)

4. Sara Wambui (granddaughter)

5. Grace Waitherero (granddaughter)

6. Jane Wamuyu(granddaughter)

The grant was subsequently confirmed on 4 February 2016. During the confirmation proceedings, a parcel of land described as Title No. Konyu/Baricho/144 measuring approximately 4.1 and which was listed as the only asset comprising the deceased's estate was shared out in four parts of 1.025 acres each. Grace Wamuyu Karanja and Lucy Gathigia Maina, the only surviving children of the deceased were given two of those parts. Hannah Gathigi Macharia was given one part and the remaining part was given to Joseph Ngatia Mbuthia, Sarah Wambui Mbuthia, Grace Waitherero Mbuthia and Jane Wamuyu Mbuthia in their joint names. These four people are described as the children of one of the deceased's sons but who, like his father, is deceased as well.

By a summons in general form dated 8 February 2017 the applicant sought, in the main, to have the grant made to the respondent revoked or annulled on the grounds that the proceedings to obtain it were defective in substance and that the grant was obtained fraudulently by making of false statements and non-disclosure or concealment of vital information.

In the affidavit in support of the summons, the applicant deposed that she is the widow of one of the deceased's sons, Francis Maina Mithamo who died in 2005. She swore that she had never been served with the petition and the thumb-print on the petition purporting to be hers was forged.

The applicant also swore that she was not satisfied with the manner in which the estate had been distributed for two reasons; first it was against the wishes of the deceased and secondly, it was inconsistent with the Kikuyu customs on inheritance. According to these customs, the deceased's daughters, including the respondent, were not entitled to inherit any part of the deceased's estate.

In response to the summons, the respondent swore an affidavit in in which she admitted that the applicant is indeed her sister-in-law, having

been married to her deceased brother Francis Maina Mithamo.

By that very fact of the death of her husband, so the respondent swore, the applicant was stranger to the deceased's estate and she could only lay a claim on it in the name of her late husband. Accordingly, considering that she had not obtained legal authority to represent her deceased's husband estate, she did not have capacity to lodge any claim on his behalf. This, obviously, was more of a statement of law than a factual issue.

That notwithstanding, the deceased's estate had been shared out equally amongst his children and the applicant's late husband's share had been given to her. The respondent further swore that the deceased died intestate and the question of whether the distribution of his estate was in accordance with his wishes did not arise.

On 22 February 2018 directions were taken to the effect that the applicant's summons be heard by way of viva voce evidence; however, when the matter came up for hearing on 6 November 2018, Mr. Kingori, the learned counsel for the applicant, sought to have directions varied so that his client's summons could be disposed of by way of written submissions. Mr Kamwenji, the learned counsel for the respondent, did not object and so, by consent of the parties, submissions were filed based on the affidavit evidence.

Although the target of the applicant's application is the grant made to the respondent, what emerges as the major bone of contention in these submissions is not necessarily that grant; the applicant's primary concern is the scheme adopted in the distribution of the deceased's estate and nowhere is this more apparent than in the applicant's submissions; her counsel has submitted as follows:

> ***The applicant seeks to revoke the grant confirmed to the respondent on the ground that the estate was distributed contrary to the applicable law and without her knowledge.***

He submitted further as follows:

> ***It is not in dispute the deceased died in the year 1976, prior to the commencement of the Law of Succession Act…The applicant invites the court to take judicial note(sic) of the Kikuyu customary law on devolution of a deceased's estate, which apply herein….***
>
> ***By failing to follow the said customary law and instead applying the statutory law, the applicant submits that the respondent had the grant confirmed by means of an untrue allegation of a fact, customary law being a matter of fact, which was essential in point of law applicable to the confirmation of grant…***

As much as counsel has attempted to tie the issue of the law applicable to the distribution of the distribution of the deceased's estate to what would be, in the words of section 76 (c) of the Act, 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, the upshot of his client's grievances is that the distribution of the deceased's estate during the confirmation proceedings should have been subject to Kikuyu customary law and not the Law of Succession Act cap. 160.

It is worth noting, however, that amongst the grounds raised in the applicant's application for revocation or annulment of the grant the ground prescribed in Section 76 (c) of the Act is not among them. I will revert to this issue at a later stage but for now it is apt to address one vital issue which counsel has raised and which is central to his client's application.

In the excerpt of the applicant's submissions which I have quoted above, counsel is correct to the extent that the question of whether a certain custom or customary law exists is a question of fact; if counsel was to go the full hog, he would have submitted that for this very reason, the custom or customary law in issue is subject to proof by a party who alleges that it exists or existed at the material time. Indeed **section 51** of the Evidence Act, cap. 80 is to the effect that when the court has to form an opinion as to the existence of any general custom or right, the opinions of persons who are likely to know of the existence of such custom or right are admissible in evidence. Perhaps, for better understanding, it is necessary that I reproduce it here:

> ***51. Opinion relating to customs and rights***
>
> ***(1) When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.***
>
> ***(2) For the purposes of subsection (1) of this section the expression "general custom or right" includes customs or rights common to any considerable class of persons.***

Thus, there has to be an opinion upon which the court has to form its own opinion as to the existence of a general custom or right. This provision is also clear that such an opinion can only be given by persons who would likely know of the existence of the particular custom or right thereby implying that evidence has to be called.

Considering the applicant's submissions in the context of this provision of the law, what the applicant ought to be asking from this honourable court is for it to form an opinion on the existence of a general custom of a class of persons, in this case the Kikuyu community, on distribution of a deceased person's property amongst his children. In this regard it was incumbent upon her to present evidence that the deceased was from the Kikuyu community and evidence of such witnesses who would ordinarily know that at the time of the deceased's demise, a particular custom or right regarding inheritance existed and thus the distribution of his estate would be subject to such custom or right.

If there is any doubt on the applicant's burden to prove the existence of a custom which should influence the distribution of the deceased's

property, section 107 of the Evidence Act should dispel such a doubt; that section is clear that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Rather than prove the facts upon which his submissions are anchored, the learned counsel for the applicant asked me to *'take judicial note of the Kikuyu customary law on devolution of a deceased's estate'*. With due respect to the learned counsel, this I cannot do for two good reasons; first, it would be contrary to section 51 of the Evidence Act and second, the facts which a court should take judicial notice of and which need not be proved are clearly prescribed in section 60 of the Evidence Act; existence of a custom or right peculiar to a particular class of persons is not among those facts.

The upshot is that the applicant has not proved on a balance of probabilities that the deceased's estate should have been distributed in accordance with Kikuyu customs or traditions.

It has been noted that the applicant's case against the scheme adopted by the court in distribution the deceased's estate is that the deceased's daughters ought not to have benefited from the estate ostensibly because amongst the Kikuyu community, daughters would not inherit land from their parents. Assuming the applicant was to call evidence in proof of such a custom it would not go that far for the obvious reason that it is discriminatory and to that extent it is contrary to Article 27 of the Constitution which proscribes discrimination on any grounds; it states as follows:

> ***27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
>
> ***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***
>
> ***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***
>
> ***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
>
> ***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***
>
> ***(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.***
>
> ***(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.***
>
> ***(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.***

For avoidance of doubt Article 2 (4) of the Constitution is clear that any law including customary law that is inconsistent with the Constitution is invalid.

It follows that even if the applicant was to call witnesses and prove the existence of a law that is otherwise contrary to the Constitution, their evidence would have been of no consequence.

Has the applicant made out a case for revocation or annulment of the grant? I would answer this question in the negative and I am inclined to so answer because as it should now be obvious, the applicant dwelt more on the distribution of the deceased's estate than on the manner in which the grant was obtained.

The grounds upon which she sought the revocation or annulment of grant were the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by the making a false statement or by concealment from the court of something material to the case. These grounds are represented in section 76 (a) and (b) of the Act; that part of the law reads 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;***

In his submissions, counsel for the applicant was emphatic that '*the applicant seeks to revoke the grant confirmed to the respondent on the ground that the estate was distributed contrary to the applicable law and without her knowledge.'*

Certainly, this is not one of the grounds prescribed in section 76 of the Act for revocation or annulment of the grant. The closest the learned counsel came to invoking any of the grounds prescribed in law is when he submitted that '*the respondent had the grant confirmed by means of an untrue allegation of a fact which was essential in point of law applicable to the confirmation of grant*.'

No doubt the learned counsel was making reference to ground 76 (c) upon which a grant may be revoked or annulled on the ground:

> ***(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;***

This ground, however, is not one of the grounds stated on the face of the applicant's summons for revocation or annulment of the grant**.** In any event, there was no evidence that in obtaining the grant the respondent made an untrue allegation of a fact essential in point of law to justify the grant. What the applicant alleges to have been suppressed is a custom that was not proved and which, in any event, would be contrary to the Constitution even if it were to be proved.

In the final analysis, I do not find any merit in the applicant's summons dated 8 February 2017 and it is hereby dismissed. Parties will bear their respective costs. It is so ordered.

Dated, signed and delivered in open court this 29th day of November 2019

Ngaah Jairus

JUDGE