



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO.150 OF 1997

IN THE MATTER OF THE ESTATE OF NYENJE GATHIRU (DECEASED)

ELIJAH KABUGA MUCHIRI.....APPLICANT

- V E R S U S -

EDWARD KINGORI WACHIRA alias KIMATHI NYENJE.....RESPONDENT

J U D G M E N T

Before me is the summons for revocation/annulment of grant dated 9th May 2006 brought by Kimathi Nyenje alias Edward Kingori Wachira.

It is brought under the provisions of section.76, and rules 44(1) and 59 of the Probate and Administration Rules, of the Law of Succession Act Cap 160 Laws of Kenya.

The respondent is Elijah Kabugu Muchiri who is also the petitioner in this cause. The applicant seeks orders that: -

1. The grant of letters of administration issued on 25th October 2005 in respect of L. RMAHIGA/KAMOKO/453 and L.R. NYAHURURU/LESHAU/KARAGOINI BLOCK 1/274 be annulled.

2. That the respondent be ordered to bear the costs of the application.

The grounds for the application are set out on the face of the application and his affidavit sworn on the 9th May 2006. The petitioner/respondent filed a replying affidavit sworn on 9th July 2007 opposing the application.

In his application the applicant argues that the deceased Nyenje Gathiru had two wives Rebecca Wangari Nyenje (deceased) who had three children including the petitioner, and Milka Nyokabi Nyenje who had 9 children including the applicant.

That prior to his death, the deceased made a will and deposited it in Othaya Branch Kenya Commercial Bank in which he willed that;

1. The Applicant do inherit the land Nyahururu /Leshau / Karagoini BLOCK 1 /274

2. The Respondent to inherit only 0.754 HA out of Mahiga/Kamoko/453

To that end, that the respondent had obtained the grant herein fraudulently and without the knowledge of the rest of the family as the deceased died testate. That he concealed material facts which if the court had been seized of the same it would not have confirmed the grant. That the grant had become useless and inoperative and hence ought to be annulled.

The respondent denied all the allegations set out by the applicant and avers that he never concealed anything from the court and he did everything above board.

- He cited the applicant and members of his family
- He listed them in the form P&A5
- That there was no will and had it been there the applicant would have notified the family/court in advance
- That the applicant's family upon being cited engaged the services of a lawyer who remained on record for a long time.
- That there was no grant to be described as inoperative as he had already completed the administration and distributed the estate.

The matter was heard by way of oral evidence and because of the length and time it has taken, it was handled by several judges starting with J.V.O. J, then Khamoni J., M. Kasango L.J, M.S.A Makhandia J. (as he then was), Serгон J, Wakiaga J, Mativo J. The applicant's family did not help matters because of their style of litigation, different members of the same family litigating separately.

The applicant testified and called the then Branch Manager, Kenya Commercial Bank, Othaya Branch, one NAHASHON KIRUI KARUMBA who produced a brown envelope that contained two pieces of paper with writings which he considered presented his father's last will and testament.

His own testimony was that he knew of the matter on 25th October 2005 when he was told that the respondent had obtained title to the two parcels of land and that he confirmed the existence of this cause on 18th October 2005. He conceded that from the record, he and members of his family including his mother were cited and that indeed there was counsel M/S Mirugi Kariuki on record from his family. He dissociated himself from the actions of his mother and his brothers saying that they had their issues with regard to this matter, and there he had his own, and these two were separate.

He also confirmed that he knew of the cause at the time of confirmation after which he filed that application dated 8th March 2006 under certificate of urgency, and that nowhere in the affidavit supporting that application had he mentioned the existence of the will despite stating that it came to his knowledge in 2005. He acknowledged that his brother one, Josphat had filed a summons for revocation of the grant which he had withdrawn, allegedly after reading the 'will'.

His two witnesses were Francis Mwangi a surveyor, and his assistant John Mugo. Their testimony was that they were with the deceased on 30th August 1990 when he commissioned Francis to go to his shamba and mark out the boundaries.

According to Francis he did this work on parcel No. L.R MAHIGA /KAMOKO/452 which measured 2.54HA. He testified that upon verifying the boundaries the deceased asked him to put what he had found on the ground in writing in the form of a will, which he did and he and John signed it as witnesses. He said that he did not know on that day that he was going to write a will.

John's work on the material date was to "hold the tape" for Francis. At the end of the work he was asked to sign a document. He had no idea it was a will. He was surprised to learn that what he had witnessed was a will.

The petitioner was heard by Mativo J. He testified that his father had only one wife, his mother, and two parcels of land No. L.R MAHIGA /KAMOKO/453 and another which he inherited. He testified that he included the applicant in the succession cause so that they would not lay any claim to his father's land, that they had been summoned at the chief's and before the clan and they had ignored/refused to appear.

He said it was the chief who had written the introduction letter stating that the applicant's mother was the wife of his father. That the applicant and members of his family did not at any one time oppose the petition for the confirmation of the grant.

He explained the relationship that exists between him and the applicant.

That his grandfather had two wives namely Wanjiru and Nyambura. Wanjiru had three sons who included the deceased his own father Nyenje.

That Nyambura did not have a son and she, under the system of marriage known as woman to woman marriage, "married" Wahiga, the mother to the applicant, to bear her sons. That when Nyambura died, Wahiga inherited her parcel of land No. L.R MAHIGA /KAMOKO/ 484 which had been given to Nyambura by her husband. The parcel LR MAHIGA/KAMOKO/453 was inherited by his father Nyenje and hence the applicant could not ask for a share from it.

I heard the respondent's witness Waweru Kabuga who testified that he and the respondent were cousins because their fathers were brothers. He confirmed that Nyenje had one wife, the mother of the respondent, and that the mother of the applicant Nyokabi (Wahinga) was brought to the home by Wanjiru the wife to the grandfather. That the applicant's family was occupying the land that belonged to Wanjiru just as the respondent's family occupied what was given to their grandmother and shared to their fathers. He said his own land was No. MAHIGA/KAMOKO/485 neighbouring that of the applicant's family – which was registered in the name of Josphat Wangonde a brother to the applicant. He confirmed that the applicant and his brothers had forcefully buried their mother on the respondent's land on a bid to push him out as is an only son.

Parties closed their case and filed written submissions which I have considered.

The only issues for determination are whether there was a will, and whether the grant confirmed on 25th October 2005 was obtained by way of concealment of the fact material to this cause to warrant its revocation or annulment.

s.76 of the Laws of Succession Act provides: -

A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides either on an application by way of interest party or of its own witness.

a.

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.

d.

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

Was there was a will?

The documents produced by the applicant and his witnesses and purported to be a will speak of parcel No. Mahiga/Kamoko/452. The subject matter of this succession cause is parcel No. Mahiga/Kamoko/453.

P.W.2 testified that the parcel of land he worked on at the behest of the deceased was no. Mahiga /Kamoko/452 measuring 2.54HA. In the document he wrote, the parcel of land featuring there is L.R Mahiga /Kamoko /452. No other parcel of land is mentioned. In this cause the estate is about L.R Mahiga /Kamoko/453 measuring 2.38HA.

The document also mentioned that there were mutation forms to ensure the subdivision of the land as desired by the deceased. No mutation forms have been produced/or were attached to the said 'will'. I find that there was no will related to the deceased's estate as presented before this court. There could not have been concealment of a will that did not exist.

On the second issue, did the respondent conceal anything from the court or the applicant and his family, and in particular the fact of the existence of another family?

The record responds to that in the negative. It shows that there were objections in that matter from 15th February 1999. These objections flowed from the citations dated 18th February 1998, and even immediately thereafter the mother to the applicant instructed an advocate to represent her. The respondent engaged an advocate much later.

It cannot therefore be true that this cause was concealed from the family of the applicant or other persons who were been beneficially entitled. The record further shows that the hearing notice for the petition was served on the objectors' counsel, they never showed up and the grant was issued on 2nd July 2003 without any objections from the applicant's family.

The summons for confirmation of grant was served personally to the mother of the applicant when it came for hearing on 18th October 2004. The record again shows that in response to that service, Sammy Nderitu a brother to the applicant appeared in court.

Another of applicant's brothers Josphat Alex Wangondu attended court on 25th October 2005. He told the court that the brother who used to appear on behalf of their mother had passed away and he Josphat had come to take his place. He too tried to adjourn the matter. Khamoni J, noted that on 18th October 2004 it had rejected Sammy Nderitu's oral application and now Josphat Alex Wangondu Muchiri had also appeared and had not filed any papers i.e. protest against the confirmation of the grant. He ruled that on that basis Josphat had no *locus standi* to address the court. There being no formal protest he proceeded to confirm the grant.

It is after this that the present applicant filed his application of 8th March 2006. The record contradicts the applicant's position that the respondent concealed the applicant's family from the court. It is clear that they were actively involved and were well aware of what was happening in the matter. So, all along the applicant and his family have been well aware of every step that the respondent has taken and they cannot be heard to say that the respondent concealed anything from them.

The applicant contends that his mother was the 2nd wife of the deceased. Interestingly he did not call any witness to this highly contested fact. Instead he called witnesses only to testify to making of the 'will'.

The respondent called his cousin-a nephew to his father who testified that the mother to the applicant was married to the grandmother Nyambura – and inherited her portion of land. The applicant has not rebutted that testimony at all and it remains unchallenged. It also remains unchallenged that their mother's portion of land was registered in the name of his brother Josphat. Hence clearly from the evidence before me it would appear that the applicant is not beneficially entitled to the estate of Nyenje Gathiru.

Finally, I thought it necessary to agrees an issue that arose during the hearing, and in the applicant's submissions. The record will show that the applicant complained bitterly that the respondent called his mother a prostitute. Taking into consideration the seriousness of that allegation, I perused the file to check that out. I did not find any such reference in the pleadings, or submissions, or testimony of the respondent. I do not know where that came from but it is not in any court document attributed to the respondent.

That beside, the applicant has not established that the deceased herein died testate, neither has he established his claims sufficiently enough to stand up to the requirements of S.76 of the Laws of Succession Act, as set out in his application.

The upshot of this is after considering all the evidence before me, the submissions on record I find that the summons for revocation of grant must fail.

The same is dismissed with costs.

Dated, delivered and signed this 29th January 2018 at Nyeri

Teresia M Matheka

Judge