



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2875 OF 2015

(CHIEF MAGISTRATE'S COURT AT KIAMBU. SUCCESSION CAUSE NO.93 OF 2006)

NAOMI WANJIRU NJOROGE.....1ST APPLICANT

JOHN KIMANI NJOROGE.....2ND APPLICANT

STELLA NJERI NJOROGE.....3.RD APPLICANT

VERSUS

WINSTON BENSON THIRU.....RESPONDENT

IN THE MATTER OF THE ESTATE OF NGINGA KAMANGA (DECEASED)

JUDGMENT

The deceased, **Nginga Kamanga** died on 2nd March 1990 intestate.

A Petition for grant of letters of administration was filed by Winston Benson Thiru on the 29th May 2006.

He was survived by the following beneficiaries:

- i. Margaret Wambui Nginga**
- ii. Winston Thiiru Nginga**
- iii. Racheal Murugi Nginga**

His estate comprised of:

KIAMBAA/KIHARA/T.123

KIHARA/KIAMBAA/716

The grant was confirmed on the 25th day of July, 2007 and the mode of distribution of the suit properties was as follows;

1. KIAMBAA/KIHARA/T.123

a. Margaret Wambui Nginga

2. KIHARA/KIAMBAA/716 Winston Benson Thiiru

On 24th November 2015 the Applicant, **Naomi Wanjiru Njoroge** on behalf of two others namely, **John Kimani Njoroge** and **Stella Njeri Kimani** filed Summons for revocation of the confirmed grant dated 25th July 2007. The grounds adduced were that the Applicants are the

children of **Rachael Murugi Nginga**, daughter of the deceased who died on 18th March 1993. The Applicants stated that the Proceedings were defective in substance as the Respondent did not include the name of Rachael Murugi as a beneficiary of the Estate of Nginga Kamau and in so doing disinherited the children of Rachael Murugi Nginga.

On 24th November 2015, the Applicant (Naomi Wanjiru Njoroge) also filed an Affidavit in support and alleged that the grant was obtained fraudulently by the concealment from the Court of some material facts such as she is the granddaughter of the deceased, the Respondent is her uncle being the brother of her deceased mother, Rachael Murugi Nginga who were both children of the deceased.

The Applicants aver that the Petitioners also failed to disclose material facts before the court which if it had been; the Court could not have made the grant in their favour. Further, that the Petitioners in **Succession Cause No. 93 of 2006 at Chief Magistrate's Court at Kiambu** failed to inform the court that they had a sister Rachel Murugi (though deceased) and that she had children surviving her and that the Petitioners also used a misleading letter from the Chief dated 11th July 2005. As a result of the above, the grant was obtained by means of untrue the applicants were dispossessed from benefitting from the estate of their grandfather through their mother.

Among the issues raised by the Applicants was that; the property of the deceased Nginga Kamanga i.e. **Kihara/Kiambaa/T.123** and **Kihara/Kiambaa/716** were distributed among the Respondent and Margaret Wambui Nginga thereby dispossessing her mother Rachael Murugi Njoroge; that the Court did not have jurisdiction to issue the grant as the 2 properties of the deceased namely **Kihara/Kiambaa/716** & **Kihara/Kiambaa/T123** were way above the value of Ksh.100,000/- and that the Administrators failed to include the property of the deceased being **LR. No. 12062/485 at Kariobangi Phase 4 House No. S-59-E**.

On 2nd March 2016, Winston Benson Thiru the Respondent filed a Replying Affidavit and at paragraph 5 of the affidavit he stated that their father had mobilised them to build their late sister the said houses at the Mathare plot, which consisted of about 5 or 6 single rooms and thereafter their sister occupied some and rented others, before she shifted to Ithanga in Ruiru in or around 1983 or 1984. At paragraph 6 he stated that their sister throughout her life never raised the issue of inheriting any land from their father during his lifetime or even from their mother after the death of their father and she never claimed anything from them by the time their mother died in the year 1997. He knew that prior to her death, his said sister had told their mother that she would like to be buried at Langata cemetery where her husband was buried, and when she passed on in the year 1993 she was surely buried in accordance with her wish.

In paragraph 8 of the affidavit, he stated that he could sadly remember that in or around the year 1996 the 1st and the 2nd defendant applicants herein came to his mother just before she later died and they told her that they wanted land from their maternal grandfather's land which ought to have been inherited by their late mother, whereupon their mother told them that there was no land left for them as their grandfather had given his plot number **KIHARA/KIAMBAA/T.123** to his unmarried daughter Margaret Wambui and his land parcel number **KIHARA/KIAMBAA/716** to him prior to their father's death a matter which he had explained to their late mother who understood and accepted it prior to her death.

The 1st Applicant filed a Further Affidavit on 1st April 2016 and on paragraph 8 stated that the property referred to in number **(j)** of the Supporting Affidavit was a typographical error and it has nothing to do with the estate.

HEARING

Naomi Wanjiru Njoroge, PW1 testified in Court that the two administrators of the estate left out their mother's name from the chief's letter and could therefore not access their mother's share of the estate. During cross-examination, she stated that the grandfather did not distribute his estate during his lifetime as there was no will. She also objected to the claim that the house in Mathare was built by the family members. She also stated that the second letter from the chief was written after the Applicants approached him regarding the property left by the deceased administrator. The chief instructed them to have a meeting with Winston Benson in the presence of one of the elders but the administrator never attended. At the meeting, the elder informed them that they could not obtain their late mother's share and upon informing the chief on the outcome of the meeting, he wrote a letter to Court indicating the actual beneficiaries of the estate.

Hannah Wambui Mbugua, DW1 stated that he visited the deceased two days before he died and he told her that he had already distributed his properties between his two children. He did not mention Rachel in the distribution.

Njoroge Kamanga, DW2 testified in Court that the land is about two acres and was to be divided between Margaret and Winston. During cross-examination, he stated that the deceased had 4 children, 2 girls and 2 boys. He also admitted that the applicants had a meeting with him.

Wilson Benson Thiru, DW3 stated that the deceased called a meeting in 1989 and told Rachel that he would not give her anything since he had built for her a house in Mathare and because he had received dowry from her husband. He also stated that the reason he did not include Rachel's name in the Petition was because their father had not left her any property. He further testified that the applicants had lodged a caution on the land which was later removed after they did not attend the scheduled hearing. During Cross-examination, he told the Court that the reason why the sister could not inherit is because she was married. He also confirmed that the deceased had 4 children.

ISSUES FOR DETERMINATION

The first issue for determination is on the jurisdiction of the Chief Magistrate's Courts with regards to succession matters.

The second issue for determination whether the deceased distributed all his assets to his children or while contemplating his death thus amounting to gifts *mortis causa* or should the assets should devolve to the beneficiaries in accordance with the laws of intestacy?

The final issue for determination, if the distribution of the assets do not amount to a gift *mortis causa*, whether there was a valid oral will

made by the deceased distributing his estate?

DETERMINATION

In deciding the present application, it is important to determine whether the grant of letters of administration issued by the Chief Magistrates Court at Kiambu is valid. Among the issues raised by the Applicants was that the grant issued at the Chief Magistrates Court at Kiambu was defective for want of pecuniary jurisdiction. The Respondent, in the petition for grant of letters of administration had stated that the total assets of the deceased's estate amounted to Ksh. 100,000/=. The Applicants however aver that the administrators misled the court as the assets could not be possibly worth Ksh. 100,000/=.

Section 49 of the Law of Succession Act previously presented the pecuniary jurisdiction of the Magistrates' Courts at Ksh.100,000/=.

The **Magistrates' Court Act No. 26 of 2015** under **Section 24**, amended **Section 49 of the Law of Succession Act** as follows:

- a. **"By deleting the words "Resident Magistrate" and substituting therefor the words "Magistrate's Court", and**
- b. **By deleting the words "one hundred thousand shillings" and substituting therefore the words "the pecuniary limits set out in section 7(1) of the Magistrates' Courts Act 2015."**

Section 7(1) of the Magistrates' Courts Act stipulates as follows:

"A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed— (a) twenty million shillings, where the court is presided over by a chief magistrate;...."

Previously, the Magistrates' Courts dealt with the estate of a deceased person, provided the net value of the estate was not more than Ksh. 100,000/=. In this instant case, the trial court entertained the cause when its monetary jurisdiction was limited to Ksh.100,000/=. The Petitioner, at that time, submitted in the Petition that the value of the assets of the deceased's estate at that material time was less than or equal to 100,000/=. This Court is therefore unable to establish as a matter of fact that the trial court lacked the jurisdiction to entertain the matter when it did as the suit property had not been listed as part of the deceased's estate.

The Respondent herein has claimed that the deceased had bequeathed the suit property namely **Kiambaa/Kihara/T.123** to Margaret Wambui Nginga and **Kihara/Kiambaa/716** to Winston, before he died. This was done just after he was diagnosed with prostate cancer and 'knew that his days in the world were numbered'. This was made in the presence of their mother and one Robert Kamau as stated in his affidavit dated 14th December 2016.

In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). The assets that are the subject of a gift do not form part of the estate and such assets pass directly to the donee as provided for by **Section 31 of the Law of Succession Act** as follows;

- "A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-***
- (a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and***
 - (b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and***
 - (c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and***
 - (d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and***
 - (e) the person making that gift dies from any cause without having survived that illness or danger; and***
 - (f) the intended beneficiary survives the person who made the gift to him:***

Provided that-

- i. no gift made in contemplation of death shall be valid if the death is caused by suicide;***
- ii. the person making the gift may, at any time before his death, lawfully request its return. the person making the gift may, at any time before his death, lawfully request its return."***

With regard to the present application, the deceased bequeathed his assets to his children because he was expecting to die soon due to his illness. This satisfies the first condition. However, the subject matter of what was being bequeathed is immovable property thus the said gift

cannot be treated as a gift *mortis causa*.

In relation to whether the alleged gifts could amount to gifts *inter vivos*, the Court in **Re Estate of The Late Gedion Manthi Nzioka (Deceased)[2015]eKLR** stated that:

“For gifts inter vivos , the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.”

In this instant case, the alleged gifts to the two issues were gifts of land. The gifts were given to them orally in the presence of their mother and Robert. The property was still registered under the deceased’s name even after his death. That being the position, the gifts cannot amount to gift *inter vivos* as they do not satisfy the provided conditions.

One of the issues arising from the hearing was that Rachel could not inherit because she was married and the deceased had received dowry from her husband. The exclusion of married women from inheriting on the basis of their dowry being paid is discriminatory against married daughters. **Article 27 of the Constitution of Kenya, 2010** prohibits discrimination on the basis of sex and marital status among others. This Court can therefore not allow the Respondent to disinherit Rachel’s estate on the basis of gender and marital status as it is discriminatory in nature.

Hon. Kimaru J in **PETER KARUMBI KEINGATI & 4 OTHERS VS. DR. ANN NYOKABI NGUTHI & 3 OTHERS (2014) EKL**R supported this argument by providing that:

“as regards to the argument by the Applicants that married daughters ought not to inherit their parents’ property because to do so would amount to discrimination to the sons on account of the fact that the married daughters would also inherit property from their parents’ in-law, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents.”

The Respondent’s position is that the deceased, prior to his death had made a logical and lawful oral will. Under **Section 9 of the Law of Succession Act**, an oral will is valid if it is made in the presence of two or more competent witnesses and the testator dies within a period of three months from the date of the making of the will.

The deceased, in 1989, called for Rachel Njoroge in the presence of his wife and Robert Kamau and informed her that he was not giving her any parcel of land as she had been assisted by her father when building her house in the Mathare plot. Rachel Njoroge allegedly agreed to that and in fact requested for her father’s blessings only which he was happy to do so.

By looking at the evidence on record and the laws applicable to oral wills, it is clear that the utterances by the deceased prior to his death did not constitute a valid oral will. The instructions were given in the presence of the deceased’s wife, Rachel and Robert Kamau more than 3 months prior to his death. The oral will has therefore not satisfied the provisions of **Section 9 of the Law of Succession Act**. Subsequently, all the deceased’s assets should devolve to his beneficiaries as per the rules of intestacy.

That then brings this Court to the question on whether the grant issued was valid. Among the documents required before an application for a grant of letters of administration is approved, is a letter from the chief which confirms the deceased’s beneficiaries who could apply for the grant of letters of administration of the deceased’s estate.

In this instant case, there are two letters from the chief, one dated 11th July 2005 which was used when petitioning the court for the grant of letters of administration and another letter dated 23rd March 2015. The letter dated 11th July 2005 provides that the deceased was survived by two children only. The letter dated 23rd March 2015 however indicates that the deceased was survived by 3 children and two are deceased. Rachel Murugi’s children have also been listed. Further, the two different letters from the chief indicates that the administrator(s) concealed from the chief and the trial court material facts regarding the true beneficiaries of the deceased’s estate.

Therefore, the grant and confirmed grant of 25th July 2007 were irregularly and illegally granted contrary to **Section 76(a)(b) of the Law of Succession Act Cap 160**.

FINAL ORDERS

On the basis of the foregoing, this Court deems it fair and just to find as follows:

- a. That the grant issued in Succession Cause No.93 of 2006, Chief Magistrates Court at Kiambu is hereby revoked.**
- b. That as a consequence of (a) above, the orders of 25th of July 2007, confirming the grant are hereby vacated**
- c. That Winston Benson Thiru and Naomi Wanjiru Njoroge are hereby appointed administrators of the estate of the**

deceased;

d. That the new administrators shall apply for confirmation of the grant to be made to them out of Kiambu, Succession Cause 93 of 2006 where the issue as to who is entitled to the property in question shall be addressed; and

e. That each party shall bear their own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF APRIL, 2018.

MARGARET W. MUIGAI

JUDGE OF FAMILY DIVISION OF THE HIGH COURT

In the presence of:

MR. KAMATA FOR THE RESPONDENT

MS. MAKORI FOR THE APPLICANTS