



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO.207 OF 1997

IN THE MATTER OF ESTATE OF DANIEL KARURI KOGI (DECEASED)

JOHNSTON MATHENGE KARURI.....APPLICANT

VERSUS

GRACE NYACHOMBA MWANIKI.....RESPONDENT

J U D G M E N T

Before me is the Summons for Revocation/Annulment of Grant brought under section 76 of the Laws of Succession Act cap 160 Laws of Kenya and Rules 44 (1) and 73 of the P&A Rules. It is dated 10th October 2011 and was filed on 11th November 2011. It is supported by the affidavit of Johnson Mathenge Karuri the applicant. He seeks orders that the grant of letters of administration made in this matter be revoked on the grounds that he and his sister Wambui Karuri were misled, and they never consented to the confirmation of the grant, that the grant was obtained fraudulently by concealment of something material to the case.

In his supporting affidavit he raised this main issues

- 1) The property Ruguru/Karuthi/361 which was registered in the joint names of himself and his father each only ½ share. That this property he was to share with his sister Wambui Karuri 3.0 acres, one, 1.0 acres.
- 2) The conduct of the administrator Grace Nyachomba Mwaniki that she was his married sister who wanted to grab everything without considering he, and his sister.
- 3) That he and his sister had not consented to the confirmation of the grant as per rule 40(8) of P&A rules and therefore the same ought to be revoked.

While perusing the file I came across a second summons for revocation/annulment of grant dated 4th November 2011 and filed on the same date. Supported by the affidavit of the applicant herein.

On 24th November 2011 he filed a notice to withdraw the application of 10th November 2011 because there was one filed by his counsel on 14th November 2011. However, on perusing the file I did not find any summons for revocation/annulment of grant filed on 14th November 2011.

Be that as it may directions were taken for the summons for revocation/annulment of grant dated 10th November 2011 on 18th May 2012 and proceeded for hearing before J. Wakiaga Judge on 19th December 2013.

When the applicant testified he stated his objections;

- i. That the respondent though a child of the deceased was married long time ago and only came to the home to inherit her father's property;
- ii. That she never informed him when she was filing the succession cause.
- iii. That she did not deserve to inherit anything and all the property ought to be shared to his father's three houses.
- iv. That his father had distributed his estate before he died by settling each house on its own parcel of land.

His view was that: -

- 1) Ruguru/Karuthi/767 be shared among the three wives.
- 2) Ruguru/Karuthi/361 Himself- 3.00 acre His sister-Wambui -1.0 acres 1.9 acres to the 3 other sons of the deceased
- 3) Naromoru Block 1/Kieni East /1- among the 3 houses
- 4) Naromoru/Block 1/Kiamathage/128 among the 3 houses
- 5) Laikipia/Tigithi/Matanya Block 3/638 among the 3 houses
- 6) That there were 2 plots Naromoru Block 1/612 and Plot 18 Hiriga market which had not been distributed.

He called 4 other witnesses to testify including his sister. Each witness objected to the distribution of the estate by the respondent because she was married and had not been there during the life time of the deceased – that she was not given anything by the deceased, and did not deserve to get anything from the deceased's estate.

According to the respondent/administrator she filed her proposed mode of distribution after the court appointed one representative from each of the four houses of the deceased wives and granted them leave to file summons for confirmation of grant. She said she distributed the estate fairly giving the applicant Ruguru/Karuthi/361 where he was in occupation, that her step sister Lucy Chaki had her own the parcel of land next to Kiamathage 128. To herself and her sister she gave Kiamathage 128 and Matanya Block 3/683.

She called 2 witnesses her sister and PW2 who confirmed that she was the daughter of the deceased and deserved to inherit her father's property.

The applicant was represented by Mr. Ombongi, the respondent by Ms. Thungu. Each counsel filed written submissions.

I have perused the same and the issues that arise are: -

- 1) Whether the respondent and her sister are children of the deceased?
- 2) Whether the respondent was entitled to obtain letters of administration?
- 3) Whether the manner in which the grant was obtained brings it into the purview of section 76 of Laws of Succession Act and subject to revocation.

On the first issue, the record shows that all along the applicant has referred to the respondent as his sister together with the sister Teresa Wamucii. The only bone here appears to be the fact that their mother died long ago in 1937 and the two were married in the 50s.

According to the applicant his father got his property long after these 2 had gotten married and therefore they did not deserve to inherit anything.

The Law of Succession Act does not discriminate children- a child is a child as far as the law is concerned regardless of marital status/gender.

The record also shows that the previous trial Judge found that the deceased was polygamous having married 4 wives, and appointed a representative from each house as joint administrators. This is confirmed by the grant of letters of administration intestate issued on 25th November 2010 to the respondent, Patrick Muriithi Karuri, Wambui Karuri and Richard Warui Karuri.

Hence it is not correct to submit that the applicant was not aware of the respondent's application for letters of administration. It is all on record that everyone was at liberty to file their mode of distribution but they never did and she did. It is correct and on record that the respondent did not consult the rest of the family while determining the mode of distribution.

Daniel Karuri Kogi died on 28th December 1985 at the age of 81 years. According to the chief, Ngorano, vide his letter of 14th August 2006, he was survived by-

1. Miriam Nyathigi Kahiga- daughter in-law
2. Johnson Mathenge Karuri- son
3. Patrick Karuri Muriithi- son

4. Richard Warui Karuri-son
5. Wambui Karuri- daughter
6. Grace Nyachomba Mwaniki-daughter
7. Teresa Wamucii Kiruru- daughter

His properties were listed as: -

- Naromoru/Naromoru/Kieni East Block 1/1 -10.8 acres
- Naromoru/Kiamathage Block 1/128 - 7.7 acres
- Ruguru/Karuthi/361– 5.9 Acres
- Ruguru/Karuthi/767-10.9 acres.
- Laikipia/Tigithi/Matanya Block 3/683 – 3.3 acres

The Respondent shared the estate as follows: -

1. Land parcel No. **Ruguru/Karuthi/767** measuring 10.9 Acres to be shared by: -

- a) Patrick Karuri Muriithi 4.0 Acres
- b) Miriam Nyagithi Kahiga 1.4 Acres
- c) Richard Warui Karuri 5.5 Acres

2. Land parcel **Ruguru/Karuthi/361** measuring 5.9 Acres to be shared by: -

- a) Johnson Mathenge Karuri 3.0 Acres
- b) Wambui Karuri 2.9 Acres

3. Land parcel **Naromoru/Naromoru Block 1/Kieni East/1** measuring 10.8 Acres be shared by: -

- a) Patrick Karuri Muriithi 5.0 Acres
- b) Miriam Nyagithi Kahiga 1.8 Acres
- c) Johnson Mathenge Karuri 1.8 Acres
- d) Wambui Karuri 1.8 Acres
- e) Richard Warui Karuri 1.8 Acres

4. Land parcel **Naromoru Block 1/Kiamathenge/128** measuring 7.7 Acres to be shared equally by: -

- a) Grace Nyachomba Mwaniki
- b) Teresa Wamucii Kiruru

5. Land parcel **Laikipia/Tigithi Matanya Block 3/683** measuring 3.3 Acres to be shared equally by: -

- a) Grace Nyachomba Mwaniki
- b) Teresa Wamucii Kiruru

She acknowledged there was another sister by name Lucy Chaki who was unmarried. She did not provide for her only stating in passing that she lives on her own land. It is noteworthy that this Lucy Chaki was not mentioned in the list of beneficiaries. It is not clear why she was left out.

From the testimony of the protestor it is also evident that there are other children of the deceased who are not mentioned in the list of beneficiaries. There are properties which have not been distributed. The explanations given are not clear. For example, **Laikipia/Salama/Muruku Kieni East No.4**. This was shared among some of the beneficiaries and not the others. There is no evidence that that was taken into consideration while the rest of the estate was being distributed.

The respondent asked to explain why some members of the family had bigger shares than others she stated for example *“I thought Muriithi and Waweru ought to have big shares so that they can develop..... Richard Warui Karuri is from Wairimu’s family, I gave him 5.5 acres because he was the youngest and so that I could not hurt his feelings”*.

She relied on what she referred to as her father’s unwritten wishes on how to distribute the estate. She had not lived in the home for years, did not consult the other beneficiaries, yet went ahead to distribute the estate in what appears to be an arbitrary manner.

I have carefully considered the evidence on record and the submissions by counsel.

I find that the deceased was indeed polygamous and had four wives who included the mother of the respondent and her sister Teresa Wamucii. He and his wives were all deceased as at the time of succession. The brings the estate into the purview of s. 38 of the law of Succession Act.

That the fact that the mother of the two died in 1937, and they got married in the 1950s cannot be a reason to disinherit them. They are still children of the deceased and are entitled to inherit from his estate.

The applicant has demonstrated that he and his sister as beneficiaries did not consent to the mode of distribution contrary to the provisions of Rule 40(8) of the P&A rules which states;

Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be directions in chambers on notice in Form 74 to the applicant, the protestor and to such other persons as the court thinks fit. (emphasis added)

The record shows that on the 22nd March 2011 when the grant was confirmed the applicant herein as a beneficiary was not present in court. A perusal of the Summons for confirmation of the grant shows that no consent was attached from him or his sister. In fact, except for Teresa Wamucii none of the other beneficiaries had signed the consent. Neither the applicant nor his sister was served with the hearing notice for the confirmation. So, clearly, the respondent was not forthright with that information.

The respondent in distributing the estate completely disinherited one of the beneficiaries, a step sister who is married just like her and her sister but who was not even mentioned in the list of beneficiaries. This beneficiary DW8 told the court she only learnt of the distribution when the respondent told her she was now the new owner of a parcel of land **Naromoru/Kiamathiga Block I / 128** belonging to the deceased which she was merely utilizing. She too was not present on 22nd March 2010, neither did she sign the consent or file any document relinquishing her right to inherit.

The respondent not having lived in the home for so many years, and being among the eldest in the family, I think it was incumbent upon her to attempt at least consult the rest of the administrators, if not the family members. The family members too ought to feel the obligation to come together and deal with property sharing issues. In any event the provisions of section 38 of the Law of Succession Act was clearly not complied with. It states

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

I doubt that the law of Succession Act is just a piece of legislation that creates rights without obligations. The deceased father cannot just be treated as the creator or accumulator of property to be shared in acrimony. Succession matters are in their nature family matters. The law should not just be the vehicle through which people jostle for property of the deceased merely because they are entitled to inherit, without respecting the creator of that wealth. I doubt that the deceased owner of the property would want his or her property to be the source of disharmony in their families. I think it is time courts discouraged all the fighting that comes in the sharing of a deceased persons’ estates. Members of families should not be heard to say that they cannot sit together with the single agenda of sharing out their parents’ property in a manner that is respectful to the deceased, always alive to the fact that the property they are fighting over does not belong to any of them in the first place. My humble view is that it is high time that ADR became a mandatory preliminary process in Succession matters, with guidelines on how to go about it within the confines of the law and Constitutional provisions.

That said, I am of the view that this family ought to have another opportunity to share their father’s estate, now with the full realization that there is no way they can leave out their two sisters. The respondent also ought to realise that she cannot distribute to herself while disinheriting another married sister.

In conclusion I find that the grant was obtained without the consent of the applicant and his sister. They were not aware of the date or the application. Secondly, contrary to submissions by counsel for the respondent some of the beneficiaries were disinherited as they were left out.

The application for revocation of the grant succeeds. The grant issued on 25th November 2010 and confirmed on 22nd March 2011 is revoked.

A fresh grant to reissue to the four administrators. The administrators to file Summons for confirmation of grant within three months from the date hereof, taking into consideration the foregoing..

No orders as to costs.

Dated, delivered and signed at Nyeri this 12th day of April 2018.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant-Atelu

Mr. Kinuthia holding brief for Mr. Ombongi for the applicant

Ms. Anne Thungu on record for respondent- no appearance

Applicant Present

Respondents-present

Administrators -present

Mumbua T. Matheka

Judge