



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO.1407 OF 1997
IN THE MATTER OF THE ESTATE OF KAGETO GITOME (DECEASED)
JUDGMENT

PLEADINGS

The deceased Kageto Gitome died intestate on the 8th of August 1976.

Prior to his death, the deceased had three wives who later died leaving several children and grand children.

John Kamau Mugwe, grandchild of the deceased filed a petition for grant of letters of administration intestate on 16th July, 1997 and declared himself the only relative/person in his family who survived the deceased. The grant was issued on 13th October 1997 and later confirmed on 23rd June 1998. The asset available for distribution was/is **NYANDARUA/SOUTH KINANGOP/ 564** which was distributed wholly to the Respondent as per the confirmed grant.

The Applicant/Objector, Anne Njoki Macharia, daughter of the deceased, filed Summons for revocation of grant on 12th May 2014 under **Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules**. The Applicant sought the grant of letters of administration issued to the now deceased John Kamau Mugwe be revoked on the following grounds:

- 1. The grant was obtained by means of an untrue allegation of facts intended for self gain bearing in mind that there were other beneficiaries**
- 2. The grant was obtained fraudulently by making of a false statement and by the concealment from the court facts material to the confirmation of the grant.**
- 3. John Kamau Mugwe, now deceased, failed without reasonable cause to proceed diligently with the administration of the estate.**
- 4. The applicants were not aware of such grant being issued and only came to know of it when the deceased wife had gone to the chief for a letter of confirmation of beneficiaries, hence the delay is inordinate.**

The Application was supported by the affidavit of the Applicant sworn on 9th May 2014 and a further affidavit sworn on the 19th of April 2016 and Replying Affidavit filed on 19th May 2016 as written statement and relied on all pleadings she filed as her evidence in Court.

In the affidavits, she deponed that the other beneficiaries of the deceased's estate will lose their right of inheritance as Mary Wangari Kamau, the administrator's wife and Respondent herein, has petitioned the Court for the grant of letters of administration of her late husband's estate in **Succession Cause 60 of 2011- High Court Naivasha**. The Respondent further intends to transfer the suit property to her name. The suit property (**NYANDARUA/SOUTH KINANGOP/ 564**) was registered under the administrator's name after he fraudulently misrepresented himself as the only surviving grandson of Kageto Gitome (deceased) and obtained grant and confirmed grant in the instant/present Succession Cause/Court File as the only surviving relative of the deceased.

Further, the wife to John Kamau Mugwe may sell/transfer the suit property after obtaining the grant of letters of administration. Due to these circumstances on the 8th of January 2014, the Applicant lodged a caution in respect of the suit property citing her interest as a beneficiary of the deceased's estate.

Mary Wangari Kamau averred in her Replying Affidavit filed on 31st March 2016 that the Applicants were aware that the grant of letters of administration was issued to her husband and none of them had raised any objection. She stated that it was agreed, during a meeting that was held on the 26th of May 1974, that the suit property was to be registered under John Kamau's name who later cleared the debt amounting to KShs. 2000 as settlement fee on the 9th of November 1993. The Respondent further deposed that the land has already been transferred to her and therefore the suit should be dismissed as the beneficiaries had not raised any complaints regarding the confirmed grant.

HEARING

OBJECTOR/APPLICANT'S CASE:

The matter proceeded for hearing on the 17th of May 2016. Hannah Njoki Macharia (PW1) stated that the suit property **NYANDARUA/SOUTH KINANGOP/ 564** belonged to her father the deceased herein, who had 3 wives, (now deceased) and 9 children. John Kamau, the administrator of the deceased's suit property was the child to Gitome; the second wife's son and therefore the deceased's grandson.

The Family of Kageto Gitome(deceased) consisted of;

1. 1st wife Njeri Kageto -4 children
2. 2nd wife Wangui Kageto- 2 children
3. 3rd wife Wanjiru Kageto-3 children.

The Applicant /Objector, the last born child of the 3rd wife to the deceased, confirmed that her father died intestate. The 3 wives and children of the 1st & 2nd wives are deceased but there are many grandchildren of the deceased who are entitled to share the deceased's estate by virtue of their late parents share from their father's estate.

John Kamau lived on the suit property, near the school that he taught. After the Applicant's father and mother died, the said John Kamau was left on the land. The administrator claimed to be sole beneficiary of the deceased's estate specifically the suit property, he fraudulently obtained the deceased's Identification Card and burial permit which he presented to the Assistant Chief misleading him thus issuing a letter dated 24th February 1997 that assisted him in obtaining the title deed to the land. He later obtained the grant on 13th of October 1997 without consulting the family of the deceased and declared himself the only surviving relative of the deceased. He obtained the grant as well as the confirmed grant without consents from the family of the deceased.

The Applicant contacted John Kamau severally to discuss the issue of the land but he did not agree to a meeting. When he died, she discovered that his widow, Respondent herein, had had the intention of subdividing the land to his children and on checking at the Land Registry, she confirmed that the land was in fact registered under his name and not the deceased. The family met the Chief in 2016 to try and come up with a solution to the problem, they could not agree on the way forward as the Respondent did not want to engage in any negotiations with the family of her late husband.

Leah Wambui (PW2), told the Court that the deceased herein had 3 wives. The 1st wife had 4 children namely Gitome, Kariuki, Wanjiru and Wangari and they are all deceased. The 2nd wife had 2 children namely Gitome and Mugo and they are all deceased. The third wife had 3 children namely Dorcas Njeri, Leah Wambui (herself) and Hannah Njoki and the children are all alive.

She further stated that the administrator of the land built his home on the suit property where her father was later buried on. The sons of the administrator currently reside on this land. She also stated that the preferred mode of division of the land is by the number of wives of the deceased and therefore the land should be divided among 3 houses. During cross-examination, she stated that the deceased, his wives and their children are buried on the land. The land was not given to John Kamau, as his widow the Respondent alleged and therefore the land should be distributed to the surviving family members of the deceased's family.

Edward Kamau Ndirangu (PW3) stated he is grandson to the deceased and son of the deceased's son (also deceased) from the 2nd wife. His father was brother to John Kamau Mugwe, administrator of the deceased's estate. He had no problem with all grand children sharing the suit property. During cross-examination, he stated that John Mugwe built a house on the land as he was teaching at a nearby school. He also stated that there was a time the family of the deceased herein met at home in 1974 to discuss on the way forward in relation to the suit property. At the meeting, the deceased did not know what was going on. The said John Kamau Mugwe was living on the land Plot 564 and his aunts tilled the land. He did not live on the land or use it. He confirmed that there was an agreement/letter and his name is at Number 8 of the list but he did not agree that John Kamau Mugwe was to take the land alone.

RESPONDENT'S CASE:

Mary Wangari Kamau (DW1) Respondent herein, widow of John Kamau Mugwe, grandson to Kageto Gitome (deceased), stated that they moved to the shamba Plot Number 564 South Kinangop Scheme in 1964 and have been there to date. None of the children of the deceased and their families resided there. The Applicant's mother, Joyce Wanjiru, was not buried on the land but by one of her daughters on her land. The (now deceased) administrator was buried on the suit property. After the deceased died, her late husband sought the grant of letters of administration as the land had been given to him, as agreed during the meeting in 1974, and was not to be subdivided.

The Respondent informed Court that there was a letter dated 26th May 1974 when Kageto Gitome was alive and it was agreed in the meeting

in the presence of all family members that the suit property be left to the deceased's grandson John Kamau Mugwe. The Respondent said her husband was a teacher and he lived on the land given to him by his grandfather. She said they had 5 children who reside on the land with their families. During cross-examination, she stated that she has transferred the ownership of the suit property from her late husband's name to her name.

Jesse Mwaura (DW2), was the neighbor to the deceased prior to his death. He submitted to the Court that he did not know if the land had been allocated to John Mugwe or not. He however affirmed that John Mugwe and his family have lived on the land and John was son to Mugwe son of Kageto, he lived on the land with his family. When he died he was buried there on the land. He said that the deceased's other children did not live on the suit property.

OBJECTOR/APPLICANT'S WRITTEN SUBMISSIONS

The Objector/Applicant filed written submissions dated 13th October 2017 in support of her case.

Counsel for Ann Njoki Macharia submitted that the grant issued on the 13th October 1997 was obtained fraudulently without the knowledge of all the beneficiaries of the deceased's estate and by concealing material facts such as the existence of the deceased's children and grandchildren.

Counsel cited the holding in **STEPHEN MARANGU M'ITIRAI V SILVERIA NCEKE & 4 OTHERS (2015) eKLR** where it was stated:

“in my view the law requires that all deceased children whether alive or dead, whether male or female, married or unmarried be listed in an application for grant of letters of administration failure whereof any omitted dependant has a right to challenge the grant on such ground....”

Counsel submitted that the Applicant should not be disinherited purely on the basis that she is married as alleged in the Respondent's Replying Affidavit.

Regarding the contribution to the purchase of land by the late administrator, Counsel submitted that no evidence was presented as evidence in Court to prove that the alleged Kshs. 2000/= was paid to the Settlement scheme and if at all the same was paid, it wouldn't be logical for him to inherit what he already owns.

On the validity of the grant issued to the Respondent, Counsel submitted that since the grant issued to the administrator prior to his death ought to be revoked, the subsequent grant is *void ab initio* in respect of the suit property. Counsel cited the Alice Muthoni case (sic) which held the same view.

Counsel further submitted that the Respondent has misled the court by stating that the suit property was transferred to her. After the Applicant conducted a search, the name indicated as the owner of the land is John Kamau Mugwe, her late husband and the administrator herein. The transfer agreement between the family members consenting to the transfer of the land to John Kamau Mugwe was submitted to be a forged document and the Respondent was deliberately misleading the court by first alleging that the suit property was obtained through purchase, then later as inheritance through a gift.

On the 30th of October 2017, Mr Macharia appeared as advocate for the Respondent and confirmed that the written submissions were filed on the same day. However, at the time of writing the judgment, the submissions were/are missing in the Court file.

DETERMINATION:

The issues raised for analysis and determination from the evidence on record are;

1. What is the applicable law on the instant dispute as the deceased died before the advent of Law of Succession Act?
2. Is the deceased's estate to be administered as testate or intestate estate?
3. Should the grant be revoked?

The deceased died in 1976 as evidenced by the death certificate annexed to the Petition for letters of administration filed on 16th July 1997.

The law applicable would be Kikuyu customary Law, but the applicant/beneficiary applied for a grant of letters of administration in 1997 when the **Law of Succession Act 1981** was applicable. He obtained a grant and it was confirmed under the **Law of Succession Act 1981**.

As to the family of the deceased, both the applicant/Objector and the Respondent concede and confirm that the deceased had 3 wives and 9 children most of whom are now deceased except for the children of the 3rd/last wife, the Applicant herein and PW2 among another who did not testify in Court.

The estate of the deceased ought to be distributed amongst surviving spouse(s) and children **as provided by Section 35 -40 of Law of Succession Act cap 160.**

In the instant case, the beneficiary and administrator of the deceased's estate was/is John Kamau Mugwe(deceased) grandson of the

deceased. As legally required when he applied for grant of letters of administration he did not inform and obtain consents of the surviving family members of the deceased to be appointed administrator contrary to **Rule 26 (1) & (2) of Probate & Administration Rules** that provides;

“Letters of administration shall not be granted to any applicant without notice to every other person entitled to the same degree as or in priority to the Applicant.

An application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality and priority, be supported by an affidavit of the Applicant and such other evidence as the Court may require.”

The administrator failed to disclose in the Petition filed on 16th July 1997 that there were surviving children of the deceased and therefore obtained the grant by concealing material facts to the Court contrary to **Section 76 (b) & (c) of Law of Succession Act Cap 160** which provides;

“That the grant was obtained fraudulently by the making of false statement or by the concealment from the Court of something material to the case.

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”

The Respondent stated that the administrator obtained the suit property pursuant to a family meeting held in 1974 and a letter annexed to her affidavit dated 26th May 1974 that the deceased bequeathed the suit property to him on condition that no transfer would be done while the deceased was alive.

The Letter is translated from Kikuyu to English and states that the land is bequeathed to John Kamau Mugwe in the presence of the family.

This Court finds the said letter is not conclusive evidence of the gift *inter vivos* because the author of the letter was not disclosed to the Court and did not testify in Court.

Secondly, it is strange that while it is conceded that the deceased had 3 wives and 9 children, the family meeting was attended by the deceased and 1 wife and 7 family members only to agree and witness the deceased bequeath the land to his grandson only. There is no information or explanation as to where and why the other wives, children and grandchildren at the time did not attend the meeting or agree to the deceased giving his land only to his grandson.

PW3 testified that he was present at the meeting and his name is Number 8 on the List. He stated in cross-examination that the deceased did not know what was going on during the said family meeting. This evidence casts doubt whether the deceased wilfully bequeathed the land to the deceased grandson.

The said letter does not amount to a will of the deceased as provided by **Section 5, 7 & 11 of Law of Succession Act Cap 160**. The administrator on 16th July 1997, filed petition for grant of letters of administration intestate and not for grant of Probate with Will annexed. There are only 2 ways of legally distributing a deceased's estate either by valid and/or uncontested Will or by grant of letters of administration intestate.

If the land/suit property was gifted to the administrator as gift *inter vivos* then at least there ought to have been testimony of a witness (s) who witnessed the deceased verbally bequeath the suit property to his grandson. Better still any of the family members who were present during the family meeting held on 26th May 1974 would have testified and shed light that they witnessed the family members present accepting and the deceased bequeathing the suit property to his grandson.

At this stage of the proceedings, the administrator is deceased and the Respondent obtained grant of letters of administration to administer the deceased's estate in **Succession Cause 60 of 2011 in Naivasha High Court** on 3rd August 2011 and confirmed grant on 5th June 2012 to distribute the suit property **NYANDARUA/SOUTH KINANGOP/564** amongst the administrator's family.

Cumulatively, the administrator did not prove that he was bequeathed the suit property by the deceased, he did not disclose to the Applicant that he applied for grant of letters of administration and confirmed grant of the deceased's estate yet there was/is no dispute that the Applicant and PW2 are children of the deceased and in priority to him, have a beneficial interest and right to the deceased's estate. The administrator obtained the grant irregularly and unlawfully as considered above. The grant and confirmed grant issued to the administrator expired upon his death and subsequently another administrator(s) ought to be appointed to administer the deceased's estate.

It is confirmed by evidence on record that although the deceased 3 wives and children of the 1st & 2nd Houses are deceased and the children of the 3rd House are alive, there are many grandchildren as shown by the Chief's letter of 7th April 2014, and they would want to share their parents' beneficial share of the deceased's estate. This means that the deceased's estate is still subject to administration and distribution.

The Applicant PW2 and another sister who did not attend Court are 3 children of the deceased by his last 3rd wife. They are the only children of the deceased alive and yet the administrator did not disclose the filing of petition for grant or confirmed grant. The Law of Succession Act amplified by Constitution of Kenya 2010 do not condone discrimination of children on the basis of gender or marriage as stated in **PETER KARUMBI KEINGATI & 4 OTHERS vs DR ANN NYOKABI NGUITHI & 4 OTHERS COURT OF APPEAL CIVIL APPLICATION NO 235 OF 2014** on the issue of non - discrimination of children for purposes of Succession. All children of the deceased are eligible to

inherit from the deceased's estate.

DISPOSITION

- 1. The grant issued on 13th October 1997 and confirmed on 23rd June 1998 are hereby revoked under Section 76 of L.S.A. Cap 160.**
- 2. The Applicant/Objector, ANNE NJOKI MACHARIA, shall be administrator of the deceased's estate.**
- 3. The new grant shall be issued in the Applicant/Objector's name.**
- 4. The beneficiaries of deceased's estate shall be confirmed and the administrator shall consult and obtain consents and file summons for confirmation of grant.**
- 5. Any aggrieved party shall file protest to be determined by the Court.**
- 6. Each party to bear own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST MAY 2018

M.W.MUIGAI

JUDGE OF FAMILY DIVISION OF THE HIGH COURT

IN THE PRESENCE OF;

MR.ONDIEK FOR THE APPLICANT

MR . MACHARIA FOR THE RESPONDENT