



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 284 OF 2009

IN THE MATTER OF THE ESTATE OF MUCHEKE KITHAMBAIRUMI (DECEASED)

GILBERT KITHUCI MUCHEKE.....PETITIONER

VERSUS

DAINA MUKWANJERU MUCHEKE.....APPLICANT

JUDGMENT

1. This succession cause relates to the estate of **Mucheke Kithambairumi (deceased)**, who is said to have died sometimes in the year 1965 leaving **Land Parcel No. Mwimbi Kiraro/371** as his estate. He also left a widow (**Diana Mukwanjeru**) and two sons (**Gilbert Githuci Mucheke and Ashford Kariuki Mucheke**) as his survivors.

2. On 20th November, 2002, **Gilbert Githuci Mucheke (“the Petitioner”)** petitioned for Letters of Administration for the estate of the deceased in the Senior Resident Magistrate’s Court, Runyenjes being **Runyenyes SRM Succession Cause No. 59 of 2002**. The grant was issued to him on 3rd February, 2004.

3. Subsequently, on 10th February, 2005, the grant was confirmed and the estate distributed as follows:-

- a) Diana Mukwanjeru Mucheke - 0.20 ha
- b) Ashford Kariuki Mucheke - 0.63 ha
- c) Dickson Kirauni Daniel - 0.50 ha
- d) Gilbert Kithuci Mucheke - the balance.

4. On 4th June 2009, the applicant applied for the Revocation of grant on the grounds, inter alia, that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by the making of a false statement or by the concealment from court of something material to the case.

5. The original file was ordered transferred from the Senior Resident Magistrate’s Court Runyenjes to this court. On 8th March, 2010 an order of inhibition was issued inhibiting any dealings over Land Parcel Nos. Mwimbi/Kiraro 1333, Mwimbi/Kiraro/1332, Mwimbi/Kiraro/1331 and Mwimbi/Kiraro/1330 which were the consequent sub-divisions from the estate property.

6. The matter was not heard until 6th March, 2017, when the parties appeared before me for directions and it was directed that the matter be canvassed by way of *viva voce* evidence.

7. Originally Messrs. Mwangi E.G & Co was appearing for the applicant. However, on 21st March, 2012, the applicant filed a Notice to Act in person. On his part, the petitioner was represented by the firm of Kaberia Arimba & Company Advocates. On the date of hearing, the petitioner’s advocates failed to appear and the matter proceeded in their absence as no reason was advanced for their absence and the petitioner indicated he would proceed with the hearing.

8. **OW1 Diana Mukwanjeru Mucheke**, testified that the deceased was her husband; that she and the deceased begot **Kithuci, Kariuki and Mwenda Jasper** as their children who were all alive. It was her evidence that she did not know who Dickson Karani Daniel was and that the deceased left one property namely; **Mwimbi/Kiraro/371**.

9. She further told the court that the petitioner was her son who had filed the succession cause in Runyenjes without her consent and that she had not approved the distribution. She denied having ever sold her portion of land to Michael Kirimi or having received any money from any purchaser for her land. She further stated that Festus Njeru was her grandson through her daughter Kagendo (deceased); that Doreen Gatwiri was her married daughter and Eliphaz Mbambu was her son. She therefore urged the court to distribute the estate to her wholly to enable her distribute the same to the beneficiaries.

10. **PW1 Gilbert Kithuci Mucheke** on the other hand testified that he was a son to the deceased and that the applicant was his mother. That the deceased left him, Ashford Kariuki and Judith Kagendo as the beneficiaries of the estate. That, he applied for Grant of letters of administration at Runyenjes with the consent of the Applicant and Ashford Kariuki and that Dickson Kirauki Daniel gave them Kshs 110,000/= to file the succession cause. That the balance of Kshs 45,000/= was divided between himself, the applicant and Kariuki with each getting Kshs 15,000/=.

11. He admitted that he was the one who signed the documents indicating that Dickson Kirauni Daniel was a son although he was a nephew. It was his further evidence that Michael Kirimi to whom the applicant and Ashford Kariuki had sold $\frac{1}{4}$ an acre each was a neighbor who lived at Nanyuki.

12. After hearing the parties and reserving the matter for judgment, the court decided first to hear the alleged buyer, Michael Kirimi and Ashford Kariuki, the other beneficiary. However, despite being served with summons to appear the two failed to do so and the court decided to proceed and write this judgment without hearing them.

13. Having considered the evidence on record, the following are the issues for determination; ***a) whether the proceedings to obtain the grant were defective in substance; b) whether the grant was obtained fraudulently by the making of false statement or concealment of material facts or untrue allegations; c) whether the petitioner to whom the grant was made had failed to diligently proceed with the administration of the estate.***

14. On the first issue, it was not clear either from the applicant's two affidavits sworn on 4th June, 2009 and 15th February, 2011 or her testimony, how the proceedings were defective in substance. If it is the requisite consents, the applicant swore that the family had agreed that a grant be sought by her. However, she never specified when and where that agreement was reached. To the contrary, the letter dated 10th September, 2001 from the Chief of Chogoria Location shows that the applicant, her daughter and two children met in his office and agreed that the petitioner do petition for the grant. That letter was not denied or challenged in any way by the applicant.

15. As regards the consent to the distribution of the estate, the applicant stated that she was never consulted on the Succession Cause. That she has never attended any other court apart from this court. That she never acceded to the distribution of the estate as confirmed.

16. I saw both parties testify before me. I noted that both were not entirely truthful in what they placed before the court. For example, the petitioner indicated in the Petition that the deceased died in 1965 yet in his Replying Affidavit to the Application for Revocation, he denied that fact and indicated that the deceased died in 1968. For the applicant, she denied in her testimony knowing Michael Kirimi to whom she is alleged to have sold a portion of her share even the agreements to that effect, yet in her Further Affidavit sworn on 14th June, 2011 she had in paragraph 8 thereof alluded to apportioning him a part of her inheritance. Such are the parties the court dealt with.

17. On my part however, I note from the record of the Runyenjes Court that the consent to the distribution was not filed. However, the record for the 10th February, 2005 reads:-

“Petitioner present

Court: All the beneficiaries are present and in agreement with the manner of distribution of the estate as stated in the affidavit in support of the summons for confirmation.

Order: Let the grant be confirmed as prayed”.

18. To my mind, that is a court record that cannot easily be assailable. It cannot be that the court recorded the foregoing to mislead. In any event, there was no allegation that that portion of the record was misleading or the reason or basis for the court to record misleading information. The court must have observed the applicant and the beneficiaries before it to have recorded as such. In this regard, I believe that the applicant and the other beneficiaries attended court at the time of confirmation and gave their consent thereat to the distribution of the estate.

19. As to the place of suing, the property forming the estate is situated in Chogoria within the geographical jurisdiction of Chuka Principal Magistrates Court. However, the Cause was lodged in Runyenjes Court. The latter court may not have had the geographical jurisdiction, but the petitioner indicated that the family decided to file the Cause there because of the backlog at the Chuka Court. To my mind, there was no prejudice that was shown to have been suffered as a result of the Cause being lodged at Runyenjes instead of Chuka Court. In any event, there was no evidence to show that the filing at Runyenjes was meant to keep the proceedings away from the beneficiaries whom the record shows attended the proceedings for confirmation.

20. For the foregoing reasons, the first issue is answered in the negative. The proceedings to obtain the grant were not defective in substance in any way at all.

21. The second issue is whether the grant was obtained fraudulently by the making of false statement or concealment of something material. The applicant contended that the petitioner did not reveal that she was the widow and the one entitled to take the grant; that the petitioner had left out five beneficiaries from the distribution and that he had included one Dickson Karani Daniel in the distribution yet he was not a

beneficiary.

22. The Petition shows that the petitioner disclosed that the applicant was a widow of the deceased and was alive. As regards priority to applying for the Cause, I did not see any consent signed by either the applicant or the other beneficiaries.

23. As regards the other alleged beneficiaries that were not catered for, the applicant named them as being Njeru Kagendo, Mwandiki Mucheke, Mbaabu Mucheke, Gatwiri Mucheke and Mukwanjagi Mucheke. The petitioner swore, which fact was not denied by the applicant, that Njeru Kagendo is a grandson of the applicant born in 1982; Mwandiki Mucheke and Mbaabu Mucheke are sons of the applicant born in 1974 and 1985 by someone else other than the deceased. Mukwanjagi Mucheke and Gatwiri Mucheke are daughters of the applicant born in 1960 and 1976, respectively fathered by other persons other than the deceased. Save for Mukwanjagi Mucheke, all the rest were born way after the deceased had passed on. They cannot be said to be his beneficiaries. As regards Mukwanjagi Mucheke, there was no evidence to show that the deceased had accepted her as his child and taken her to his family. It was for the applicant to prove that fact which she failed.

24. In view of the foregoing, I am satisfied that the alleged beneficiaries were not entitled to any share in the estate and their exclusion from distribution did not vitiate the proceedings.

25. As regards Dickson Kirauni Daniel, it turned out that he was not a son of the deceased as indicated by the petitioner in his application for confirmation dated 30th August, 2004. The applicant testified that she did not know who this Dickson Kirauni was. The petitioner told the court that Dickson Kirauni was the man whom the family had approached to finance the prosecution of the Succession Cause. That the family agreed to sell to the said Kirauni 0.5 of an acre from the estate for Kshs.150,000/- of which he paid cash Kshs.45,000/- which was divided equally between the applicant and the two sons. That the balance was used to prosecute the Succession Cause.

26. Although the applicant denied all the foregoing, I have already noted what the Runyenjes Court recorded on the day of confirmation. The applicant was in attendance yet she did not question the presence of "a stranger" among the beneficiaries to whom 0.5 of an acre was being distributed to. To my mind, on a balance of probability, Dickson Kirauni Daniel might have purchased the 0.5 acre with the agreement of the family. In any event, the applicant never served the said Dickson Kirauni Daniel with the application to defend his position.

27. In view of the foregoing, I am not persuaded that the grant was obtained through fraud or misstatement of material facts.

28. Finally, whether the person to whom the grant was issued had, after due notice to him, failed to move expeditiously in administering the estate. The grant was confirmed on 10th February, 2005. The applicant alleged that save for the share of Dickson Kirauni Daniel, all the others shares remained in the name of the petitioner. The petitioner denied this allegation and averred that the estate has since been divided, distributed and registered as follows:-

- a) Mwimbi/Kiraro/1330 - Dickson Kirauni Daniel
- b) Mwimbi/Kiraro/1331 - Ashford Kariuki Mucheke
- c) Mwimbi/Kiraro/1332 - Diana Mukwanjeru Mucheke
- d) Mwimbi/Kiraro/1333 - Gilbert Githuci Mucheke

29. None of the parties produced the extract of the register to prove his/her allegation. It was left for the court to discern from other available evidence on record what the exact position on the ground could be. The record shows that on 8th March, 2010, Kasango J. inhibited title nos. Mwimbi/Kiraro/1330, 1331, 1332 and 1333, respectively as forming part of the estate. Annexed to the petitioner's Replying Affidavit sworn on 29th October, 2010 are Sale Agreements signed by, inter alia, the applicant and Ashford Kariuki Mucheke. In those agreements, the two are shown to be selling portions of their subdivisions. I had earlier in this judgment made a finding that I believe the agreements were genuine as the applicant had alluded to one of them in her Further Affidavit.

30. That being the case, there is no way the applicant and Ashford Kariuki Mucheke, the other beneficiary, would have been able to freely deal with the portions of their shares if the administration of the estate had not been either finalized or at its tail end. In this regard, I am not satisfied that the applicant proved this allegation to the required standard or at all.

31. In view of the foregoing, I am satisfied that the application lacks merit and the same is hereby dismissed. This being a family dispute between a Mother and Son, I will make no orders as to costs.

DATED and **DELIVERED** at Meru this 30th day of May, 2018.

A. MABEYA

JUDGE