



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 2692 OF 2008

IN THE MATTER OF THE ESTATE OF KANYONI KAMUNGE (DECEASED)

HARRISON MUHIA KANYONI.....OBJECTOR

VERSUS

GEORGE KANYONI NJOROGE.....1ST PETITIONER/RESPONDENT

MESHACK NGANGA KANYONI..2ND PETITIONER/RESPONDENT

MARY NJOKI KAMUNGE.....3RD PETITIONER/RESPONDENT

JUDGMENT

1. The Objector herein presented an application by way of summons for revocation or annulment of grant before this court on 25th November, 2008. The Objector is seeking an order for the annulment of the amended grant of letters of administration intestate issued to the Respondents herein, which was confirmed on 3rd November 2006. The application is premised on grounds that the grant was obtained fraudulently by making of a false statement or concealment of material facts from the court and that an improper procedure was used in obtaining the grant.
2. The Application was supported by an affidavit sworn by the Objector, in which he states that he is a son of the late Kanyoni Kamunge who died intestate in 1966. The grant of letters of administration intestate was issued to the Respondents herein, but the list of beneficiaries named in the Succession Cause 156 of 1990 noted only five (5) beneficiaries, to the omission of nine (9) others as stated in the letter from the chief of Kijabe location.
3. The Objector submits that the three (3) administrators failed to inform the court that the deceased had given land to some of the beneficiaries before his death. He asserts that only the beneficiaries who were not given land when the deceased was alive are entitled to a portion of the land parcel Lari/Bathi/108. That the distribution shown in the confirmation of grant was obtained fraudulently by leaving out some of the beneficiaries and including other persons who were not entitled to inherit.
4. The Objector alleges that he was never served with the citations when the application was filed in court. That the grant and confirmation were obtained by means of untrue allegations, deceit and concealment of important information and as such should be annulled and other Administrators appointed.
5. The 2nd Respondent filed a Replying affidavit on 6th November 2009 in which he asserts that none of the beneficiaries were left out in the distribution as alleged by the Applicant. He urges that his father, who had seven (7) wives and four (4) parcels of land, shared his property among his wives and not his children.
6. The Objector and the 2nd Respondent herein recorded a consent which was adopted by the court on 20th February 2012. The consent was later found by this court in its ruling of 4th March 2015 to be irregular since it was obtained as a result of a misapprehension of facts. The court had been erroneously made to believe that all three (3) administrators were agreeable to the mode of distribution of the estate in the proposal filed on 29th October, 2010. The matter thus proceeded to full hearing.
7. At the hearing on 29th July 2015, the Objector, Harrison Muhia Kanyoni, in his sworn testimony stated that he is the son of Kanyoni Kamunge (deceased) and that he is aware that a grant of letters of administration was issued to the Respondents herein at Kiambu law Courts.

He prayed for the revocation of the grant stating that some beneficiaries were left out of the distribution while others, namely James Kanyoni and George Kanyoni, who are not beneficiaries, were included.

8. The Objector submitted that his deceased father had many parcels of land including the one which is in issue being Lari/Bathi/108. He stated however, that Meshack, the 2nd Respondent herein, is now in agreement with his line of argument, while Mary Njoki Njoroge also known as Karunge, the 3rd Respondent herein, had relinquished her claim on the land and has since died. James, George and Isaac had received their share of land and were therefore not included in this distribution.

9. The Objector stated that the deceased had seven wives, each of whom had children. George is the grandson of the deceased through Njoroge Kanyoni, while Isaac and James are grandsons through John Kamunge Kanyoni. He urged that the deceased distributed land to their fathers while he was still alive and the suit land should be given to only those who were young at the time of the deceased's death and were not given their share.

10. The Objector adopted his affidavit of evidence and stated that in the year 1957, Njoroge Kanyoni was given the parcel of land known as Lari/Bathi/111, while John Kamunge Kanyoni was given the parcel of land known as Lari/Bathi/109. Each took possession of their respective parcels of land. Lari/Bathi/108 is still in his late father's name and was to go to the six children who were very young in 1966 when his father died and who are the only ones who have been living and working on the said land parcel to date. They have made a proposal on how to distribute the land amongst themselves.

11. On cross-examination, the Objector clarified that he was born in the year 1943 even though his ID card reads 1945. He is the fourth born of his mother Nyambura, their first born being John Kamunge. He asserted that his late father did not distribute land according to houses but to each individual son who had come of age. He does not know of any land that belonged to his father which has not been distributed save for Lari/Bathi/108.

12. The Objector submitted that the 2nd Respondent is his step brother from the house of Gathoni Kanyoni. Their sisters are married and have since left home. The 3rd Respondent was the wife of Kamunge Kanyoni, the son of Njeri Waitherero, one of the deceased's wives. The deceased's wives lived, died and are buried on the land parcel save for one Wanjiru who was buried on her son's land.

13. He stated that all his brothers from his mother's house are dead and only he and their wives and children remain. The 2nd Respondent is also the sole-surviving son of Gathoni's house having lost his two (2) elder brothers, Kamau and Kamunge. He placed the 2nd Respondent in the age group of his immediate elder brother.

14. The Objector was about ten (10) years old when his father died in the year 1966 but his father told him, in the presence of John Kamunge Kanyoni, Joseph Gachau, Kamunge Kanyoni of Nyambura's house, Samuel Kamunge of Gathoni's house, Joseph Karanja Kanyoni and some elders, how his land was to be distributed.

15. Mr. Meshack Nganga Kanyoni the 2nd Respondent is a son of the deceased Kanyoni Kamunge. He confirmed that his late father had seven (7) wives and four (4) pieces of land. In the year 1957, the land in their area was adjudicated and demarcated and his father distributed his pieces of land among his ten (10) sons who had obtained ID cards and were married at the time. All the sons who were minors at the time were left out.

16. The 2nd Respondent contended that in 1965, his father who was advanced in age called his sons in law, listed the property they had given him, and told them that the remainder should be given to the respective houses from which they took their wives whenever they brought it. His father also called his sons and divided his livestock among the houses from which each of the daughters came. The 2nd Respondent was an adult by then.

17. The 2nd Respondent spoke of a third sitting also in 1965 during which his father instructed that, none of his sons whom he had given land should lay a claim on Lari/Bathi/108. He declared that he had distributed all that he had and the remaining land was for himself and his sons whom he had not given land. These were Kamau Kanyoni, Karanja Kanyoni, Harrison Muya Kanyoni, Gikonyo Kanyoni all of the house of Nyambura, and Kamau Kanyoni and Meshack Kanyoni, both of the house of Gathoni.

18. The 2nd Respondent testified of a fourth sitting in which his father invited the elders and reiterated that none of those whom he had given land should lay a claim on land parcel no. Lari/Bathi/108. In the meeting, his late father urged them not to waste their money going to court over the land and threatened that a curse would fall upon whoever would go to witch doctors over the land. For these reasons, the 2nd Respondent was reluctant to come to court over this land for fear of inviting the curse upon himself.

19. He submitted that he is in agreement with the proposed mode of distribution filed by the Objector on 21st October 2011. That the only beneficiaries in opposition to the mode of distribution are Isaac Njenga the son of Kamunge Kanyoni and Wanjiru Kiomora, James Njoroge Kamunge a grandson of the deceased through the house of Wanjiru, and George Kanyoni grandson of Njambi.

20. The 2nd Respondent said he was aged about 79 years and was already an adult when his father died. He had attended the meetings his father called and that his father had distributed his land according to his sons and not according to his wives.

21. The 2nd Respondent admitted that he was one of the administrators together with Mary Njoki Kamunge and George Kamunge Kanyoni and had filed the Kiambu Succession Cause voluntarily. He acknowledged that he swore the supporting affidavit which had indicated that the land in Ndeiya/Thigio was distributed among six wives. The land in Githunguri/Githiga was distributed among three wives, and the land in Githunguri/Kiambaa also among three wives. The land in Lari/Bathi/108 was to be divided among six wives, while a piece of land measuring eight (8) acres was left for Wairimu and his father since Wairimu had no children.

22. The 2nd Respondent asserted that he had previously stated that his father distributed his land according to his wives, and that the first born sons were to hold land in trust for their respective houses. He however later came to learn that his father actually distributed his land according to his sons as shown in the list by his brother Muhia, the Objector herein. The objector's list of distribution was prepared by Harrison Muhia at the Chief's office.
23. He urged that the proposed mode of distribution in the Kiambu cause was agreed upon so that a curse would not befall the family but two of the family members subsequently changed their position when a surveyor was brought to survey the land. He is in agreement with the mode of distribution in the Objector's list since the land is being distributed to Kanyoni's children.
24. The 2nd Respondent asserted that the earlier confirmation had left out some sons and confirmed that all the sons in the Objector's list did not receive any land from the deceased during his lifetime. He observed that the beneficiaries had objected to the list but not produced an alternative one.
25. On 19th June 2017, Mr. Gakaria counsel for the Respondents presented two witnesses before the court for the Respondents' case.
26. The first witness, James Kanyoni Njoroge, gave sworn testimony and stated that he is a grandson of the deceased. He produced his witness statement dated 19th July 2016, agreements dated 26th June 1990 and 25th August 1994 respectively, an affidavit sworn on 9th September 2008 by Meshack Nganga and a further affidavit sworn on 15th October 2010 by Meshack Nganga. The court adopted the documents as evidence.
27. Mr. Njoroge submitted that the documents show that there was an agreement to distribute his grandfather's land according to the four houses he left behind. The documents were drawn by his grandfather and Meshack Nganga and thumb printed by Meshack and other family members representing the four houses. It is this agreement that was taken to the court in Kiambu.
28. He contended that in the succession cause at the Kiambu court, he represented the house of Wanjiru, Meshack Nganga represented the house of Gathoni, Joseph Karanja represented the house of Nyambura and George Kanyoni represented the house of Njambi. The representatives were to distribute the land to beneficiaries in their respective houses. The Applicant was not involved since he comes from the house of Nyambura which was already represented. He on the other hand stood in place of his father John Kamunge who was involved in the agreements but has since died.
29. Mr. Njoroge asserted that the 2nd Respondent, Meshack Ng'ang'a Kanyoni, swore a replying affidavit in which his averments are in unison with what they had agreed upon earlier. However, Mr. Njoroge was absent due to illness when Meshack testified before the court but later, Meshack informed him that the land was being distributed and his share would be taken if he did not act fast. The Applicants have since taken the land and evicted the houses of Njambi and Wanjiru who are also entitled to the land in my opinion.
30. Mr. Njoroge averred that he was aged 23 years when the deceased distributed his land in the year 1966, and he attended the meetings. The deceased instructed them to cut trees and demarcate the four shares for the four houses and they have lived in this formation until the death of their fathers. He was aged 73 years at the time of his testimony while Meshack Nganga was about 78 years old.
31. Mr. Njoroge denied that the house of Nyambura had the majority of minor sons when his grandfather died. He stated that his grandfather had seven (7) wives but Nduta and Waitherero were not proper wives since he inherited them from his brother. He gave the two pieces of land elsewhere. His third wife Wairimu had no children.
32. He admitted that when his grandfather (the deceased) died, his father was an adult and was given land in Lari/Bathi/109. The land measured four (4) acres but his father bought an additional three (3) acres abutting his land during demarcation. When his father died, Mr. Njoroge administered his estate and not his mother who is very old at 97 years of age. He represented his mother's house in the Kiambu cause and stands by the mode of distribution adopted by the Kiambu Court. He reiterated that only the houses of Nduta and Waitherero have no claim on the land parcel. All the other grandsons are awaiting the outcome of this cause.
33. The 1st Respondent, George Kanyoni, was the second witness and gave sworn testimony. He stated that he is the son of Njoroge Kanyoni, a son to the deceased from the house of Njambi. That when the case was in Kiambu, his father was still alive but upon his death the 2nd Respondent called on him to step into his father's place.
34. He asserted that when their fathers were alive, they agreed on how the land parcel Lari/Bathi/108 would be distributed. After the Kiambu court gave the orders, the administrators sub-divided the land. He was to distribute the land among the beneficiaries in his father's house. He urged that their only mistake was that the petition did not indicate that the representatives had beneficiaries in each house who would each receive a share.
35. He contended that even though the land was distributed according to his grandfather's wishes, it is the Objector Harrison and Mama Njoki who live on the land parcel. The sons of the Applicant chased him away from the land parcel which he has tilled since the year 1990 up until the year 2004. He reported the matter to the police, but did not follow through with its prosecution. He later learnt that Muhia and Wangare distributed the land to only two houses instead of the four houses as stated by their grandfather and held by the Kiambu Court. His name was entered into the grant issued in Kiambu Court. He also admitted that the grant did not state that they were holding the shares on behalf of others.
36. The 1st Respondent stated that Mary Njoki who had complained about the distribution later swore an affidavit withdrawing her objection. He asserted that the Objector too had previously sworn an affidavit in which he agreed with the mode of distribution given in Kiambu court.

37. Parties filed written submissions. Mr. Gachoka Mwangi counsel for the Objector in his submissions dated 8th September 2017 stated that the application seeks to revoke a grant issued on 30th June 2006 to four people namely: George Kanyoni Njoroge, Meshack Ng'ang'a Kanyoni, Mary Njoki Njoroge and Samuel Gikonyo Kanyoni and which was later amended and confirmed on 3rd November, 2006. He pointed out that the 2nd and 3rd Respondents have since changed their position and now agree with the Applicant that at the filing of the Kiambu cause, material facts were withheld from the court. That in light of this, the grant issued at Kiambu should be revoked and a new one issued as proposed by the Applicant, since it was obtained through concealment of material facts.

38. The Applicant contended that the persons who have been residing, using, cultivating and or utilizing the land parcel since the year 1950 are those he has listed as the true beneficiaries of the parcel of land. They were minors at the time of the deceased's death. The five (5) beneficiaries from the house of Nyambura are:

- (i) Harrison Muhia Kanyoni
- (ii) Joseph Karanja Kanyoni (deceased) represented by his wife Lucy Waithera.
- (iii) Samuel Gikonyo (deceased) represented by Mary Njoki Gikonyo.
- (iv) Serah Wambui Kanyoni (deceased) represented by Miriam Nduta and Peter Ng'ang'a.
- (v) Eliud Kamau Kanyoni (deceased) represented by John Kamunge and Samuel Kagwima.

and two beneficiaries from the house of Gathoni namely:

- (i) Meshack Ng'ang'a – son of the deceased.
- (ii) Kamau Kanyoni (deceased) represented by Esther Wangari.

The others reside on different parcels of land granted to their fathers by the deceased during his lifetime.

39. The Objector contended that the Respondents herein were neither petitioners, beneficiaries nor interested parties in the Kiambu cause. That they applied to have the orders of this court issued on 5th April 2012 set aside but did not file an application to be enjoined in the present proceedings. The Objector urged that to allow the Respondents to remain in these proceedings will open a pandoras box for anybody wishing to harass and frustrate the true beneficiaries' entitlement to the small remainder of the deceased's estate.

40. The Objector submitted that the Respondents ignored the order of priority in filing succession matters, where a person dies intestate as found under **section 34 to section 40** of the **Law of Succession Act, Cap 160 Laws of Kenya**.

41. The Objector urged that the conduct of the Petitioners herein, shows a calculated scheme to delay this matter for the longest time possible to frustrate the Applicant. That the Respondents have consistently failed to comply with court orders to the Objector's detriment. They have failed to furnish the court with a list of beneficiaries and the documents they attempted to rely on cannot stand in a court of law since they were not produced by their maker.

42. The Objector urged the court to allow their application for revocation, with costs stating that the grant at Kiambu was obtained by making of false statements, concealment from court of material facts and untrue allegations of facts. They also urged the court to order a new grant to issue as per their proposed mode of distribution.

43. The Respondents failed to file their submissions even after the matter came up for mention several times. The court subsequently reserved the matter for judgment date upon request by the Objector.

44. I have carefully considered the pleadings, the submissions and the entire proceedings of this cause. While the parties have advanced various arguments, in my view, the sole issue for determination is whether the Objector has demonstrated sufficient grounds for the revocation of the grant.

45. The law on revocation of grants is set out in **section 76** of the **Law of Succession Act Cap 160** as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;**
- (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) 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;....”**

It is upon any party seeking the revocation, or annulment of a grant to demonstrate the existence of any, some or all of the grounds set out in section 76 as outlined above.

46. The Objector in this matter argues that the grant issued at Kiambu failed to make provisions for some beneficiaries himself included. According to **rule 7 (1) (e) of the Probate and Administration Rules**, when petitioning for a grant in cases of total and partial intestacy, the Applicant should include particulars of the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, particulars of such person or persons who would succeed in accordance with section 39 of the Act.

47. In petitioning for the grant, the Respondents herein, who were the Petitioner's in the Kiambu cause failed to include the names of all beneficiaries. The 1st Respondent admitted that they as Petitioners failed to indicate that they were representing each of the houses or that the share each received would be shared amongst the members of their household.

48. A litigant has a duty to make full and fair disclosure of material facts. In the Kiambu cause, the Respondents failed to disclose to the court all the beneficiaries of the estate of the deceased in petitioning for the grant of letters of administration. The requirements attached to the granting of letters of administration are provided under **rule 26 of the Probate and Administration Rules** which states as follows:

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

(2) 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 or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of the deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

49. The evidence presented before this court clearly shows that the petition in the Kiambu cause was made without the participation of all the beneficiaries of the deceased's estate. In failing to disclose to the court the other beneficiaries, the Respondents concealed from the court facts material to the cause. James Kanyoni Njoroge, a witness for the Respondents' case alleged that the Objector herein was in agreement with the mode of distribution in the Kiambu cause without producing any evidence to support his position that the Applicant was going back on his word.

50. This court has the discretion to make orders as it considers fit in the circumstances and is not bound to issue orders for the revocation of the grant as sought. On this I am in agreement with the persuasive observations of Mativo J in **Succession cause 692 of 2012, Angelas Maina v Rebecca Waiyego Mwangi and Another**, where he observed that:

“Under section 76 the court has discretionary power when faced with an application for revocation. It can make such orders as it considers fit in the circumstances. The court is not bound to issue revocation even where the case has been set out under section 76...In the matter of the Estate of Jonathan Mutua Misi (deceased) the applicant sought revocation on grounds that it had been obtained by false statements. He was a son of the deceased and his name had been omitted from the list of survivors and instead of ordering a revocation, the court directed that his name be included in the list.”

51. The law applicable in this case is Kikuyu Customary law in so far as it is not repugnant to justice or inconsistent with any written law, since the deceased died in the year 1966 before the commencement of the Law of Succession Act. The administration of the estate must however be in accordance with the **Law of Succession Act** whose **Section 2(2)** provides as follows:

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

52. The evidence presented before this court alludes to the fact that the deceased distributed his land during his lifetime. I can do no better than to quote Kneller JA in **Moses Karanja Kariuki vs Naomi Njeri Kariuki & 4 others, Civil Appeal 54 of 1981** where he observed thus:

“Now by the custom, a kikuyu father has to distribute his land among his heirs during his lifetime, if possible, and usually does so. This often happens when a son marries and it counts as that sons share if his father has not revoked this gift before he dies. (See *Restatement of African law: Kenya: 2 Succession* by Eugene Cotran, 1969, 1st edition page 15). He may make a will in his old age or on his death bed and the only formalities required are that he must say before the elders of his family (mbari) and of the clan (muhiriga) and close friends just who will be the administrator (muramati) of his estate and to whom each item of it shall go.”

53. From the facts presented before this court, it is evident that the deceased distributed all his parcels of land, save for Lari/Bathi/108, during his lifetime. This was as required by his Kikuyu customary law as clearly explained by Kneller JA in the case cited above. What is therefore left to determine is who should be entitled to Lari/Bathi/108.

54. In the case of **Kimani Gituanja vs Jane Njoki Gituanja [1983] eKLR**, in the Court of Appeal at Nairobi, Chesoni AG J rendered

himself thus:

“The succession of land belonging to a deceased Kikuyu man with more than one wife is by houses. The land is divided equally among the houses and each house shares equally among its male children. A house consists of one wife with her children. Of course even a childless wife constitutes a house.”

55. While the above case sets out the manner in which distribution proceeds under Kikuyu Customary Law, it is important to note that under the Law of Succession Act, there is no discrimination between the male and female children of a deceased. In **Rono vs Rono & Another [2005] eKLR** the Court of Appeal held that the estate of the deceased, who had died after the **Law of Succession Act** had come into force, was to be distributed under that Act which did not discriminate against sons and daughters.

56. In determining the mode of distribution of a deceased’s estate, the previous benefits received by the beneficiaries are taken into account as provided under **section 42** of the **Law of Succession Act**. The section states thus:

“Where –

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to that child, grandchild or house.”

57. For the grandchildren of the deceased to inherit from his estate, they must have been maintained by the deceased immediately prior to his death. In this case, the grandchildren of the deceased have not produced any evidence that they were maintained by the deceased immediately prior to his death. The evidence before this court shows that the elder sons of the deceased, who are their fathers, received land from their deceased grandfather during his lifetime. These shares are therefore taken into account with regard to the distribution of the remaining parcel known as Lari/Bathi/108.

58. After careful consideration of the pleadings and the rival arguments and in light of the above findings, I find that the argument and the proposal which commend themselves to the circumstances of this cause are those advanced by the Objector. Reasons wherefore, the summons dated 25th November, 2006 is allowed with the following orders:

(a) The grant issued to George Kanyoni Njoroge, Meshack Nganga Kanyoni and Mary Njoki Kamunge be and is hereby revoked.

(b) A fresh grant be and is hereby issued to Harrison Muhia Kanyoni and Meshack Nganga Kanyoni.

(c) The parcel of land known as Lari/Bathi/108 be distributed according to the mode of distribution filed by the Objector herein.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **18th** day of **June 2018**.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Objector

In the presence ofAdvocate for the Respondents