REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.1066 OF 2010

IN THE MATTER OF THE ESTATE OF KARIRI NDIRANGU alias KARIRI S/O NDIRANGU (DECEASED)

PETER MWANGI KARIRI &

PAUL WACHIRA KARIRI.....APPLICANTS

VERSUS

MURINGI KARIRI &

CHARLES NDIRANGU KARIRI.....RESPONDENTS

J U D G M E N T

Kariri Ndirangu died on 19th July 2006. According to the chief's letter dated 8th October 2010 he was survived by his two wives Muringi Kariri who had no children of her own, and Jane Wangui Kariri who had 6 children: - Florence Muthoni, Charles Ndirangu, Teresa Wanjiku, Paul Wachira, Nancy Wangeci and Peter Mwangi. He left one property MUHITO/MBIU-INI/1167.

On 24th November 2010 Muringi Kariri filed this cause and took out citations to be served on Jane Kariri and all her children and for some reasons to be seen in the course of this ruling, left out Charles Ndirangu.

Through his affidavit of service was filed on 10th March 2011, the process server, one Simon Gibson Gichuki deponed that he had on 25th November 2010 received the citations and proceeded to Kanunga Trading Centre in Mukurweini to the home of Jane Wambui Kariri where he effected service of the citations on her behalf and on behalf of her children. That she signed the original set and he returned it with the affidavit of service.

The reason why Charles Ndirangu was not one of the citees came reveals itself when on 11th March 2011 he and his step mother Muringi Kariri filed a petition for letters of administration intestate as wife and son of the deceased. Among the annexures was the certificate of official search and the form P&A 5 where Jane was listed as the 2nd wife and her children as children of the 2nd wife.

Another affidavit of service was filed on 22nd July 2011 by the same Simon Gibson Gichuki to the effect that on 5th May 2011 he proceeded to Kanunga Trading Centre where he found Jane Wambui and the other citees and he served them with the petition which they signed.

Thereafter grant of letters of administration intestate was issued on 19th February,2012. On 2nd February 2012 the administrators filed summons for confirmation of the grant. The children of the deceased were listed in form (rule 40 (1) 1) and the dependants as Muringi Kariri and Jane Wambui Kariri alias Jane Wangui Kariri. It was proposed that the deceased's estate be shared equally between the 2 widows.

On 24th October 2012 a different process server, Charity Wairimu Maina filed an affidavit of service to the effect that she had on 18th October 2012 received copies of the summons for confirmation of grant and had on 23rd October 2012, proceeded to the **"the objector's home situated at Gathungururu village"** whom she duly served.

Thereafter the grant was confirmed on 2nd November 2012.

On 10th January 2013 the administrators filed a Summons General seeking orders for the Deputy Registrar to execute the transmission documents on behalf of the Jane Wangui who was described as uncooperative.

On 15th January 2013, Charity Wairimu Maina filed an affidavit of service indicating that she had served Jane Wangui and the orders sought were granted on 22nd January 2013 in her absence.

It is in the back drop of the foregoing that on 27th February 2013 Peter Mwangi Kariri and Paul Wachira Kariri filed Summons for Revocation of grant under Section 76 (a) (b) and (c) of the Law of Succession Act, and Rules 44 and 73 of the P&A Rules.

They sought two orders: an order of injunction restraining the administrators from dealing in anyway with the deceased's estate, and the revocation of the grant issued on 19th February 2012 and confirmed on 2nd November 2012; on the following grounds: -

i. That the proceedings to obtain the grant were defective in substance.

ii. That the grant was obtained fraudulently by making of false statements and/or by concealment from the court of some facts material to this case.

iii. That the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant by failing to involve all the beneficiaries who were all above 18 years.

iv. That the grant was obtained by way of misrepresenting that all the beneficiaries had been represented whereas only two were involved in the cause.

The summons was supported by the affidavit of Peter Mwangi Kariri. He deponed that neither the applicants nor the other beneficiaries were involved in the proceedings. He annexed the affidavits of service which he averred showed that only one beneficiary had been served.

He also deponed that the distribution of the estate left out other beneficiaries who were discontented.

In response Muringi Kariri filed an affidavit on 28th March 2013 to the effect that her co-wife had been unco-operative; that the applicants resided on the same parcel of land as her co-wife they wanted to stall the matter; that the applicants had been hostile and abusive to her telling her upon her death she would not be buried on that parcel of land.

When the matter came for hearing Peter Mwangi testified and confirmed that the 1st respondent was his step mother and the 2nd his own brother. That his mother was alive and he had six siblings. He said he learnt about the proceedings in 2013 when he attempted to put up his house and his brother Charles told him not to. He denied that the summons for Revocation of Grant was brought because he did not want his step mother to inherit his father's land. He also said that there was a boundary between his mother's and his step mother's parcel of land. He also said that he did not know whether his mother was satisfied with the distribution of the estate or that she did not wish to go against her husband's wishes.

Paul Wachira also testified and generally agreed with his brother. He said that he and the 2nd respondent had put up houses on the land. That he had not signed any papers at all with regard to the succession cause.

Muringi Kariri testified that her husband had 2 wives and that he had divided his land between the two of them, that she wanted to remain on her portion of land. That after their husband died her co-wife began to demand her (Muringi's) portion. She said there were no witnesses when their husband divided his land.

DW2 was Charles Ndirangu. He confirmed that the applicants were his brothers and they were all children of Jane Wangui. That DW1 was their step-mother. He confirmed that he had three sisters whom he said were married. He said that they were all served with citations. He said they were all aware of the proceedings at all times and they never raised any objections.

He agreed with DW1's testimony. He emphasized the fact that the applicants and his other siblings and his mother were all served from the beginning of the process, and were aware of the cause but never raised any objection until the grant was confirmed.

Upon closure of the case from each side counsel Gichuhi Mwangi and Associates for the applicants and M.K. Kiminda for the respondents filed written submissions.

I have considered the submissions and the evidence on record.

The issue for determination is whether the applicants have demonstrated sufficiently that the grant herein falls within the parameters of Section 76 of the Laws of Succession Act to warrant revocation.

The applicants relied on the following cases: -

Matheka & another –vs- Matheka (2005) 2KLR 455

In the matter of the Estate of Wahome Mwenje Ngonoro (2016) eKLR

Were the proceedings defective in substance?

The respondents submit that the proceedings were started by way of citations and everyone was served. It is argued for the respondent that the applicants refusal/and or failure to cooperate was evident in the whole process.

It was incumbent upon the citor to ensure that every cite was properly served. The beneficial entitlement to inherit is personal. The widow is entitled to her share, and so are each of the children of the deceased. That is why each head counts when it comes to distribution, and why waiver is personal. The respondents have not established that each of those beneficially entitled to the estate was served with the citations or any other processes.

The citation dated 24th November 2010 was addressed to all the beneficiaries. There was a P. O Box 18 Mukurweini. There is no evidence as to whom that post office address belonged and whether the citations were posted to that address.

The affidavit of service returned carries the alleged signature of Jane Wambui Kariri. She did not testify and she was not called as a witness by either side. Curiously, the summons for confirmation of grant was "served" on all the beneficiaries at Kanunga Trading Centre including the married daughters of the deceased. How that was possible is not explained. The affidavit of service is so mean on detail that it creates a doubt as to whether they were in that house that day.

I must also point out that from the affidavits of service the two process servers involved in this case made reference to two different places as residences of Jane Wambui Kariri. None of that was explained leaving the rest to imagination which cannot amount to proof of service. The only conclusion I can draw from the facts as placed before me is that there was no service on each of those who were beneficially entitled to the estate.

As submitted by the applicants this failure to effect proper service on the other beneficiaries is in violation of Rule 26 of the P&A's Rules which clearly provides: -

> *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 (emphasis mine)*

This Rule is couched in mandatory terms. Notice cannot be equated to the disclosure of those beneficially entitled in the letter from the chief and the form P&A 5.

The affidavits of service indicate service of the citations to one Jane Kariri but no notice to each of the other beneficiaries. This violates the rule as they were entitled in the same degree as the 2nd respondent. The affidavit of service with regard to the summons of confirmation of grant is scanty of detail and leaves plenty of doubt as to whether service was indeed effected. This view is fortified by the inconsistencies I have pointed out in the affidavits of service.

The respondents did not disclose that one of the applicants was already in occupation of a portion of the land. I agree with Mativo J. in ***the Estate of Wahome Mwenje Ngonoro*** that the respondents had a duty to disclose to the court the applicants' interest to the deceased's estate as sons of the deceased, and "leave it to the court to determine the dispute".

The consents of the applicants, their siblings or their mother were not obtained in the confirmation of the grant. As I have pointed out the affidavits of service as filed leave doubt as to whether they were actually served. The respondents could have sought that these persons be summoned to appear physically in court to give their consent. The intention to have the grant confirmed without the participation of the rest of the family is demonstrated by the failure to obtain the consent or renunciation of their benefit from the three married daughters of the deceased. It appears to me they were assumed to be disinterested in the estate. That assumption is untenable.

It is submitted by the respondent that the estate was distributed to the two widows and the applicants' dissatisfaction with that is not a ground under Section 76 of the Laws of Succession Act.

I respectively disagree.

This is because that position is not supported by any evidence. The proposal by the administrators to distribute the estate between the two widows gave the impression that there was an agreement and /or consent to do so. However, without a consent from all the parties, or proof that the deceased did so before his demise, the proposal is contrary to the provisions of Section 40 of the Laws of Succession Act.

The deceased was polygamous.

According to Section 40 of the Laws of Succession Act-

> **"the deceased's personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children".**

In the summons for confirmation of the grant the respondents did not disclose the fact of the existence of the two houses. Neither did they disclose the beneficiaries from each house. The children of the deceased were listed as the persons who had survived him, and the two widows as his dependants.

In view of the specific provisions of Section 40, it was necessary for the respondents to specifically list each house, and the beneficiaries from/or those entitled from each house. By failing to do so in seeking the confirmation of the grant, the respondents rendered the application defective in substance by misrepresenting the nature of the beneficiaries.

Defective in substance here is as defined in the **Wahome Mwenje Ngonoro** – *"a defect of such character as to substantially affect the*

regularity and correctness of the previous proceeding"

From the evidence on record nothing was placed before me to prove that the deceased distributed his estate before his demise. What is not in doubt is that he left each wife in her own homestead and that is what ought to be respected.

It is however evident that the applicants were not notified of the proceedings as required by law, neither did they consent to the issuance or confirmation of the grant as persons beneficially entitled to the estate. Nothing was placed before me to show that the applicants wanted to deny the 1st respondent her share of the estate, and the allegations of failing/refusing to cooperate were not proved. It is also noteworthy that none of the beneficiaries renounced their entitlement.

All this brings the grant into the hands of Section 76 of the Laws of Succession Act for revocation.

Hence:-

i. The grant is hereby revoked.

ii. A fresh grant to issue to the 1st applicant and the 1st respondent.

iii. The two widows of the deceased and his six children are all beneficially entitled to his estate.

iv. The estate be distributed according to Section 40 of the Laws of Succession Act at the ratio of 1/8: 7/8 with the 1st respondent's share retaining her homestead where she was left by her husband, and the 2nd house's share to be shared equally among all beneficiaries.

v. Each party to bear its own costs.

Dated, delivered and signed at Nyeri this 28th day of September 2018.

Mumbua T. Matheka

Judge

In the presence of:

Ms Nyakio for Applicants

Ms Mwangi for K. Wachira for respondents