



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.304 OF 1996
IN THE MATTER OF THE ESTATE OF WAMBUI NDUTU (DECEASED)

JUDGMENT

1. The late **Wambui Ndutu** died intestate on 19th January 1994. **Teresia Njeri Wambui** alleging to be a wife to the deceased filed a petition for grant of letters of administration. She was issued with a grant of letters of administration on 25th August 1998 jointly with **George Kanyura**.

2. The applicant is a grandson to the deceased he seeks orders that grant of letters of administration issued to Teresia Njeri Wambui and George Kanyura on 21st July 1999 be revoked and or annulled on grounds that;

- a. The grant was obtained by concealment from court of material facts namely that;
- b. prior to the death of the deceased on 19th January 1994 the deceased had during her lifetime subdivided and her estate comprising land parcel **Kiganjo/Gichika/839** consequently distributed the same to her beneficiaries hence at the time of her death there was no estate capable of being distributed.
- c. That the deceased in addition to having distributed her estate had on 6th October 1989 written a valid Will hence she died testate and hence the cause herein was incompetent before court.
- d. The applicant herein Samuel Ndutu Njoroge, Beth Wanjiru Kuria and Felister Nyambura Muchai are all beneficiaries to the estate of the deceased herein they have put up their own residential premises on their respective parcels which fact was deliberately concealed to the court.

Samuel relied on his affidavit dated the 7th of July 2009.

3. Teresia Njeri Wambui in opposition to the said application filed her replying affidavit dated 26th August 2009. She avers that the deceased was only survived by herself and her children adding that the grand child of the deceased lacks locus standi to bring the current application. She denied allegations that the deceased subdivided her shamba when she was still alive adding that the Will fronted by the applicant was a forgery and the deceased had prior to her death denied the same. She stated that title to Land references **Kiganjo/Gachika/1373, 1374, 1375 and 1376** had been cancelled by a court order of 11th May 1989 in Gatundu Civil Suit No.27 of 1894. She avers that other people claiming to be beneficiaries came to the suit parcel of land after the demise of the deceased. Adding that the alleged Will made by the deceased on 7th may 1985 had been denounced by her as it was a forgery perpetuated by the applicant. She added that the said Will was a nullity as per the court order issued on September 1987 by the Gatundu Law court. She avers that the applicant and his siblings entered the suit parcel of land and started putting up structures adding that the land registrar's decision to open a new parcel number was within his discretion and besides the applicant and others had refused to return the cancelled titles.

4. Samuel Ndotu Njoroge a grandson to the deceased testified that his grandmother had three daughters Margaret Wanjiru (his mother) Rachel Njeri and Felisters Nyambura. Adding that Teresia Njeri was just but his grandmother's helper assisting her in her daily activities. He stated that though under the Kikuyu customs there is woman to woman marriage he did not witness such between the deceased and Teresia Njeri. That the land in issue was subdivided into 4 parcels while the deceased was alive and everyone even Teresia got a share. The 1st share title no. **Kiganjo/Gachika/1373** was given to Beth Wanjiru Rachael's daughter, parcel no. **Kiganjo/Gachika/1374** was given to Samuel Ndotu Njoroge, 3rd parcel **Kiganjo/Gachika/1375** was given to Felisters Nyambura while parcel no. 4 was in the names of Felisters to hold in trust for Teresia. He also informed the court that Teresia had filed another cause in Gatundu Succession cause no. 247 of 1994 where she did not include the deceased's beneficiaries adding that the same was filed without the knowledge of the deceased's beneficiaries. He stated that the deceased died leaving a valid Will with 1st Will having been made on 7th May 1989 and the 2nd Will was made on 6th October 1989 both were prepared by the same advocate and were witnessed by 2 witnesses. Adding that after the deceased's death he did not move there but his son is there who occupied the said parcel of land immediately after subdivision. He stated that he was testifying because his mother was advanced in age at 90 years and denied allegations that they were not interested. Adding that he was duly appointed by the deceased in her Will to carry out her wishes and urged the court to revoke the grant issued to Teresia and order that the estate be redistributed as per the deceased's Will. He stated that no one had interfered with Teresia's portion and that during the succession at Kiambu she was informed that they were going for subdivision and she had indicated she did not want the parcel of land but later on built there.

5. During cross-examination he stated that the portion given to Teresia was not registered in her name because Teresia did not avail herself though she was aware of what was happening. That Teresia has a title though it is not in her name as she declined to have it in her name. He denied that Teresia was harassed. He stated he was not aware that there was a court order cancelling the titles. That he took over the Gatundu case when his grandmother asked him to. That the orders the respondents refer to were gotten after the subdivision.

6. Teresia Njeri Wambui testified that she was knew the deceased since 1977 when she went to their home and asked for a child to assist her as at the time she did not have any children. She was asked to pay dowry and that she was married to her. The wazees sat and agreed and she asked her to build for her at her shamba, which she did. That she stayed there and got 5 children they stayed well until 1984 when a problem arose when she went to collect the title from Felister who refused to give her. She decided to go to Kiambu to lodge a caution, which was registered on 2nd August 1984. That Samuel Njoroge hired a vehicle KAP 554 to carry her bed and clothings and she was told to move as they had an intention to burn her house. They left her things on the road. On 24th she went to Gatundu court and filed Case no. 24/84 and she sued Wambui barring her from removing from the shamba. That they also went to KTDA and closed her account but the court ordered them to pay her money. That after she left they divided the shamba and when she went to court in 1989 the court ordered that they return it to her. She stated that Samuel was aware of her filing for grant adding that the deceased wanted her to stay in the shamba with the children at the time the deceased also had 3 children. She sought to confirm that the deceased married her traditionally. That she took the shamba as Wambui had told her. She added that Samuel was not entitled to a share of the shamba as his mother was married and so were the other 2 children.

7. On cross-examination she acknowledged that she knew Wambui was married as a 2nd wife and she had 3 children. She acknowledged being chased but stated that she went to court to demand her husband back. She was awarded maintenance.

8. Parties filed written submissions. The applicant submitted that the respondent in her petition and confirmation grant filed on 17th June 1985 intentionally omitted to include all beneficiaries especially the deceased's biological children to the estate of the deceased information which he avers was crucial for the court to make its determination. This he submits was contrary to section 51(2,g) which provides that, "*in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*"

9. On this he relied on the case of **Joseph Moswagi Mabeya v Alfred Gichana Mabeya & 4 Others [2016] eKLR**, where it was held that, “*the ground for revocation and or annulment had been satisfied owing to the petitioner’s willful concealment of some beneficiaries of the estate of the deceased in the making of the application for grant.*”

10. It was submitted that **Section 76(b)** clearly states that a grant of representation maybe revoked if it is shown that it was obtained by fraudulently making false statements or concealing from court something that is material to the case. On this he relied on the case of **Daniel Toiyianka Munik & another v Wambui Ene Taporu [2014]** where it was held that, “*it was evident that the Applicants indeed established that the Petitioner obtained the grant of letters of administration intestate by concealing from the court material facts of the case. The material facts that the Petitioner concealed is the existence of other dependents of the deceased.....The said grant was therefore fraudulently obtained. This court therefore revokes the grant that was issued to the Petitioner on 3rd March 2011.*”

11. It was further submitted that the petitioner’s excuse to omitting the same does not stand as she stated that the daughters were married off. He states that the Law of Succession Section 29 does not discriminate on ground of gender or marital status. On this he relied on the case of **Peter Karumbi & 4 Others vs Dr. Ann Nyokabi Nguithi [2014] eKLR**, “*As regard to the argument by the Applicants that married daughters ought not to inherit their parent’s property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent’s in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that the court will grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.*” That the respondent did not obtain consent of all beneficiaries and the grant was confirmed in their absence. He relied on the case of, the **Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura HCSC no. 935 of 2003**, where a grant was revoked due to failure of the guarantee to notify the applicant of the petition and to obtain his consent.

12. It was submitted that the respondent is not candid before the court as she did not bring to the attention of the court succession cause no 247 of 1994. That the grant was defective in that there was a will by the deceased and as such no grant ought to have been issued to the respondent adding that from the onset the respondent had no locus standi to bring the application until the issue of the existence of the will had been determined as such the grant was defective as the existence of the will was not brought to the attention of the court on this he relied on the case of **AnilBehari Gosh vs SMT Latika Bla Dassi & Others** where the Court of India in interpreting their equivalent section 76(a) stated, “*the expression “defective in substance “ means that the defect was of such character as to substantially affect the regularity and correctness of the previous proceeds.”* . That the respondent failed to disclose that **Kiganjo/Gachika/1376** was given to her by the deceased and also that other beneficiaries were settled there and had developed their portions of land which information he avers was crucial to the court before confirmation of the grant. On this they relied on the case of **Mumbi Mwathi v Stephen Ndungu Mwathi [2012] eKLR** where the court held that the ingredients of concealment of material facts relevant to the making of the grant had been established as follows;

“(a) *The Respondent failed to disclose that his own father and father of the applicant was the only brother of the deceased.*

(b) The Respondent failed to disclose that in fact his father and his two house hold inclusive of the house hold of the respondents' mother were settled on land parcel number Kiambaa/Muchatha/T.237.

(c) The respondent also failed to disclose that there were other persons interested in the deceased's estate who may very well have moved to challenge the alleged oral will."

13. The respondent submitted that the alleged proceedings in Succession Cause no. 247 of 1994 were letters of administration Colligenda bona which she filed when the applicant and other relatives threatened to evict her adding that it would be wrong to insinuate mischief on the respondent's part. It was submitted that the alleged Will dated 6/10/1989 was a nullity as per the order issued on 11/5/1989 in the Resident Magistrates Court at Gatundu in CMCC No. 27 of 1984 filed by the respondent and the deceased. The said court held that, **"the Land Registrar at Kiambu to rectify in respect of land parcel No. Kiganjo/Gachika/839 by cancelling all the dealings and alterations made therein after 8th October 1986 in order to give effect to the honorable court's order of 22nd day of September 1987."**

14. It was her submission that the two Wills were a manufacture of the applicant and the allegation that the deceased died testate should fail. The respondent submitted that she was a wife reason she changed her name even in her Identity card to read Teresia Njeri Wambui from Teresia Njeri Kanyuira and was allocated land even in the said Will of the deceased. Further that the court had found that she and her children were entitled to maintenance and the said findings were never challenged by the applicant. She submitted that the applicant's application does not qualify under section 29 as the deceased's 3 daughters were married and lived in their respective husband's parcels of land adding that the only claim available to the applicant is as against his father's estate. She relied on the case of Nairobi **Succession Cause no. 1974 of 2008, in the matter of Veronica Njoki Wakagoto** where it was held that, *"Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead."*

15. It is submitted that the applicant has no locus standi to file this application and neither has he proved his application on a balance of probability as such she urges the court to dismiss the same with costs.

16. The applicant seeks revocation of grant issued to Teresia Njeri Wambui and George Kanyuira on 21st July 1999 on grounds that the respondent concealment from court material facts that prior to the death of the deceased on 19th January 1994 the deceased had during her lifetime subdivided and her estate comprising land parcel **Kiganjo/Gichika/839** consequently distributed the same to her beneficiaries hence at the time of her death there was no estate capable of being distributed having distributed her estate through a written Will dated 6th October 1989. The issue of the will appears contentious.

17. There is a will annexed in the applicant's application dated 6th October 1989. The same appears to have been witnessed and allegedly signed by the deceased. The same appears to conform with the requirements set out under Section 11 of the Law of Succession Act which provides;

"No written will shall be valid unless—

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in

the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

18. The applicant argues that the the deceased having left a valid will the court should not have issued a grant of letters of administration intestate as that was irregular and tantamount to not honoring the deceased’s wishes. However no evidence was called to attest to the validity of the will or the same being a forgery as alleged by the respondent. The evidence tendered before this court is not sufficient to make a conclusive determination on the validity of the will as such the deceased estate should be reverted to intestacy.

19. That the court’s ruling in Civil Suit no. 27 of 1987 was over a matter between the respondent and the deceased and she was awarded maintenance cause for her and the children. That the same also goes to shed some light on the nature of the relationship between the respondent and the deceased. The court in its findings had indicated that the respondent being a wife to the deceased was to be maintained by her on **Kiganjo/Gachika/839** and the said property was not to be dispensed with without making necessary provisions for her. This court may not have had an opportunity to see the proceedings in the said civil suit but before the said court arrived in the said decision there could have been evidence tendered that proved that the respondent was indeed married to the deceased as such this court can also infer that the respondent was a wife to the deceased. It is important to note that no appeal was lodged against the said decision as such the same stands.

20. I note that the respondent alleges that there was a suit that emanated from the initial said distribution in succession cause 247 of 1994. From a perusal of the said court record the respondent had sought a Grant of letters of administration colligenda bona which was limited to enable her collect and preserve the estate of the deceased. This did not however bar the respondent from approaching the High court when she petitioned for a full grant in regards to the deceased’s estate. I find nothing wrong with the same as it is in line with due procedure in administration of the deceased’s estate. On the issue of the applicant’s locus standi it is his evidence that his mother is 90 years old, she cannot come to court and that it was agreed that he pursues the matter on her behalf, the age of the applicant’s mother was not challenged and so I believe him.

21. The applicant seeks revocation of the grant of letters Teresia Njeri Wambui and George Kanyuira on 21st July 1999. The law on revocation is section 76 of the Law of Succession Act. The relevant portion of the provision states –

‘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 ...’

22. The respondent in petitioning for grant of letters of administration failed to include the children of the deceased. This in my view was contrary to provisions of section 51 (g) which provides that, *“in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;”*

The respondent in her testimony in court acknowledged that the deceased had 3 children and this

information was within her knowledge when she petitioned for grant of letters of administration and subsequently for confirmation of the same. This in my view was tantamount to concealment from court of something material to the case. As such I find that the grant of letters of administration issued to the Teresia Njeri Wambui and George Kanyuira on 21st July 1999 was fraudulently obtained and revoke the same. A grant of letters of administration listing all beneficiaries to the deceased's estate shall issue to Teresia and Samuel Njoroge as co-administrators. For avoidance of doubt the same will include both the deceased's 3 children and Teresa's children sired when she got married to the deceased. The said co-administrators to discuss the mode of distribution factoring in the developments made by each of the said beneficiaries. Cost in the cause. It is so ordered.

Dated, signed and delivered this *23rd* day of *February* 2017.

R. E. OUGO

JUDGE

In the presence of;

Miss Kiaritha h/b for Miss Machio

For the Applicant

Mr. Mutua F.M. h/b for Miss Wambui

For the Respondent

MS. Charity

Court Clerk