



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 759 OF 2010

(IN THE MATTER OF THE ESTATE OF NJOGU WAHOME alias NJOGU S/O WAHOME)

MOSES WARUI GITHINJI alias NJOGU WAHOME.....APPLICANT

VERSUS

JOYCE NYAGATHU KABARITA.....1ST RESPONDENT

CHARLES WAHOME KABARITA.....2ND RESPONDENT

PETER WAHOME MARIGA.....3RD RESPONDENT

JUDGMENT

On 2nd November, 2007, the 1st respondent lodged in the magistrates' court at Karatina a petition for letters of administration intestate in respect of the estate of Njogu Wahome also known as Njogu son of Wahome who is stated to have died in 1960. The petitioner presented the petition in her capacity as the deceased's sister-in-law.

I couldn't find the affidavit in support of the petition from the record and therefore such information as to whether there were any other survivors of the deceased apart from the petitioner, or the extent of his estate, or whether he had any liabilities is not apparent from the petition itself *per se*. Nevertheless, the record from the magistrates' court shows that the grant of letters of administration was made to the petitioner on 4th March, 2009 and was subsequently confirmed on 18th November, 2009. The schedule to the certificate of confirmation of grant suggests that the deceased's estate comprised of two parcels of land identified as **Title No. Magutu/Ragati/304** and **Title No. Konyu/Ichuga/982**. The certificates of official search in respect of these parcels of land which the petitioner filed alongside the petition show that the deceased was registered as their absolute proprietor on 1st July, 1958 and 4th April, 1959 respectively.

The letter from the chief of Magutu location, apparently the place from where the deceased hailed, introducing the petitioner to court listed the petitioner and the following persons as having survived the deceased:

1. Agnes Wamuyu Mariga
2. Anne Wamuyu Gathoga
3. Charles Wahome Kabarita

4. Nancy Gathigia Kabarita

5. Peter Wahome Mariga

The same persons were described as the deceased's nephews and nieces in the affidavit in support of the summons for confirmation of grant. The two nephews were the beneficiaries of the estate; with the consent of their sisters, they shared equally the two parcels of land and from the available evidence **Title No. Konyu/Ichuga/982**, which, as will soon become clearer, is the bone of contention between the disputants, was formerly transmitted to them and registered in their names on 31st June, 2010.

By a summons for revocation of grant dated 20th August, 2010, the applicant sought to have the grant revoked; the prayer for this revocation was expressed in the following terms:

That the grant of letters of administration intestate made to JOYCE NYAGATHU KABARITA on the 18th November, 2009 by the Senior Resident Magistrate's court at Karatina succession cause No. 81 of 2007 be revoked and/annulled, on the grounds fraud (sic), concealment of material facts.

The summons was made under **section 76** of the **Law of Succession Act, cap 160** and **Rule 44 (1)** of the **Probate and Administration Rules**.

According to the affidavit sworn by the applicant in support of the summons, he was born Njogu Wahome "on or around 1955" and that he was named after his uncle whom he identified as Wahome Gathecha. During the land consolidation, his uncle is alleged to have caused the land referred to as **Title No. Konyu/Ichuga/982** to be registered in his (the applicant's) name despite the fact that he was only a minor then. The applicant swore that he was informed that he was registered as the proprietor of the land because according to the clan from which he comes, land, which he described in his affidavit as "extra land" or "ruhari" could only be registered in the names of sons of clan members; he did not disclose the sources of his information though.

The applicant's mother, so he deposed, was the sister to his uncle who apparently did not have any son; it is for this reason that he was registered as the proprietor of **Title No. Konyu/Ichuga/982**.

As far as his names are concerned, the applicant swore that at some point, his mother, Wairimu Gatheca alias Wambara, was married to one Githinji Thoiti and that is why he later adopted the name "Githinji" so that he now became Njogu Githinji. He subsequently changed it to Moses Warui Githinji.

His uncle, so the applicant swore, lived on **Title No. Konyu/Ichuga/982** with his family until his demise in 1997. They are said to have cultivated tea on this land.

Sometimes in the year 2010, the applicant decided to transfer this land to his cousins; however, upon conducting an official search of the land at the lands' registry, he discovered that it had been registered in the names of the second and the third respondents following a succession cause in respect of the deceased's estates in the magistrates' court at Karatina. According to him, "*the registration of the 2nd and 3rd respondents was wrongful as they knew the land was not part of the estate of the deceased*".

The second respondent swore a replying affidavit in response to the applicant's summons for revocation of grant; this he did on his own behalf and on behalf of the rest of the respondents. He swore that he is the son of the deceased and that the applicant is a stranger to his estate. According to him his father died in 1960.

It was the respondent's case that the applicant was only three years old when the land was registered in 1958 and as such he could not have been registered as the owner of the land. It was his evidence that the name Njogu Wahome referred to his father and not applicant. Since he is not part of the deceased's family, the respondent swore that the applicant has no basis of laying any claim on the deceased's estate.

He denied that facts material to the making of the grant were suppressed or that the grant was fraudulently made.

When the summons came up for hearing, the applicant adopted his affidavit evidence to support his case. He admitted, on cross-examination, that he had no proof of the change of his name from Njogu Wahome to Moses Warui Githinji by which he is currently known. He also testified that his uncle died in 1987. It was also his evidence that he shifted to Kinangop with his mother and father in the late 1950's or early 1960's and since then they had never lived on the land in dispute. His main reason for conducting a search on this particular land in the year 2010 was "to consolidate" all of his uncle's properties which apparently included **Title No. Konyu/Ichuga/982**.

Lawrence Githaiga Ngare(PW2), the chief of Magutu location admitted having written the letter introducing the respondents to court as the survivors of the deceased, Njogu Wahome but later, more particularly in the year 2010, the applicant came to his office seeking to pursue a succession cause in respect of the estate of the same deceased person. He then summoned both parties to his office where it was allegedly agreed that the respondents would transfer **Title No. Konyu/Ichuga/982** back to the applicant. He testified that he got the information that this particular parcel of land belonged to the applicant from his assistant chief. According to him, Njogu Wahome died in 1960.

The other of the applicant's witnesses was **Joseph Warutere Wahome (PW3)** who testified that he was one of the applicant's cousins and that he knew him as Job Wahome. According to his evidence, the applicant used to live with his father whom he identified as Solomon Wahome Gatheca who is said to have died in 1997. As far as land **Title No. Konyu/Ichuga/982** is concerned, he was aware that it was registered in the applicant's name at the instance of his said late father. He also testified that Njogu summoned them in 1997 and told them that he wanted to transfer the land into their names. However, they later discovered that the land was in the name of the respondents.

Stephen Mwangi Wahome (PW4) also testified as one of the cousins of the applicant. He stated that he lives on **Title No. Konyu/Ichuga/982** where he cultivates tea which was initially grown by his father. During cross-examination, however, he admitted that he has another land where he has settled. Although he admitted that he was all along aware that **Title No. Konyu/Ichuga/982** was registered in the name of Njogu Wahome, there was nobody by that name in their family.

One other witness who testified on behalf of the applicant was **Githui Wa Mbiti (PW5)**; his evidence was that between 1952 and 1958 he was some sort of a clerk for the deceased's clan and by virtue of his position, he was aware that **Title No. Konyu/Ichuga/982** was registered in the name of Njogu Wahome who was the son to Wahome Gatecha's sister. According to him, Wahome Gatecha could not own two parcels of land and this particular parcel had to be registered in the name of the applicant whose father is said to have been in detention then.

The applicant's sister **Virginia Wambui (PW6)** testified that his brother changed his name because "he did not want to be associated with animals". According to her evidence, their father was Githinji Thoitii. She also testified that the applicant was younger to her and that he was born when they were living together with their father.

Yet another witness **Joseph Mwai Rutere (PW7)** testified that he knew the applicant's uncle Wahome Gatheca. Although he testified that he knew nothing about the land in dispute, he again said that he was aware that the land was registered in the name of Joseph Warui. He also testified that he knew the applicant as Njogu Kamoche; Kamoche was the applicant's father. He did not know who Njogu Githinji was.

On his part, the 2nd respondent testified that the deceased was his uncle, his father's brother. He admitted that the deceased's estate was shared between himself and his cousin, Peter Wahome. However, he had no idea of how his uncle acquired the estate in the first place.

That is as far as the evidence by the parties and the witnesses went.

The grounds upon which a grant can be revoked are statutory and they are expressly spelt out in **section 76** of the **Law of Succession Act**; this section states as follows:

76. 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances

As far as I understand the applicant's application, the ground upon which he seeks revocation of the grant made to the 1st respondent is that prescribed in **section 76 (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. If I am right then the burden upon the applicant was to prove, on a balance of probability, that in petitioning for and obtaining the grant of letters of administration of the deceased's estate, the 1st respondent was fraudulent; according to the provision to which I have made reference, the petitioner can only be deemed to have been fraudulent if it is proved, still on the same standard of balance of probability, that she made a false statement or she concealed something material to the case. Inevitably, proof of the making of a false statement or the deliberate suppression of a material fact by the 1st respondent would constitute the key pillars upon which the applicant's case rests. And being so central to the success or failure of the applicant's application, it is incumbent upon this honourable court to constantly keep these issues in perspective while evaluating the evidence on record and particularly in assessing the question whether it is sufficient enough to sustain a case for revocation of the grant of letters of administration intestate made to the 1st respondent.

When the evidence by and on behalf of the applicant is considered in its entirety, what emerges, in my humble view, is a claim that can be narrowed down to ownership of the land referred to as **Title No. Konyu/Ichuga/982**. In very simple terms, the applicant's case is that this land is his and as such it ought not to have been included amongst the assets comprising the deceased's estate. The applicant is thus not laying a claim on the deceased's estate either as the deceased's survivor, a beneficiary of the estate or as his dependant. The evidence of all the applicant's witnesses revolved around the registration of the applicant as the owner of **Title No. Konyu/Ichuga/982** though at some stage the applicant appeared to contradict this evidence when he said that his search for this property was informed by the need to "consolidate" all the property belonging to his uncle. His case is best summarised and captured in paragraphs 18 and 19 of the affidavit in support of the summons for revocation of grant; in paragraph 18

he stated:

That the registration of the 2nd and 3rd respondents was wrongful as they knew the land was not part of the estate of the deceased.

The registration he is referring to is in respect of **Title No. Konyu/Ichuga/982**; this is apparent from paragraph 19 of his affidavit where he has sworn:

That I swear this affidavit in support of my application for revocation of the grant to the extent of KONYU/ICHUGA/982.

It might not be that clear but as I understand the applicant's deposition, his interest in revocation of the grant is informed only by fact of the inclusion of this particular parcel of land in the deceased's estate when, in his view, it shouldn't have. Logically, the converse is true - that if the petitioner had not included this property in the petition for grant of letters of administration then the applicant would have no qualms with the grant.

If the applicant's argument can be followed to its logical conclusion, then his allegation against the 1st respondent that she was fraudulent because she either made a false statement or she concealed a material fact in her petition to court could only be because the 1st respondent deliberately made a false statement to the effect that **Title No. Konyu/Ichuga/982** belonged to the deceased when she knew that it was not or that she failed to disclose to court that in fact this parcel of land belonged to the applicant.

This then leads to the question whether there is any proof that this land belongs to the applicant and not the deceased and if so whether the 1st respondent and the rest of the respondents were aware of that fact but deliberately chose to suppress it or make a false statement in respect of that fact.

From the very outset, it is clear that the applicant's only link to the land in question is his claim on the name, Njogu Wahome. He was out to persuade the court that his current identity has undergone some form of evolution. In the affidavit he swore in support of the summons for revocation of grant and which I made reference to at the early stages of this judgment, he deposed that his original name was Njogu Wahome, having been named after his uncle Wahome Gathecha. It has to be recalled that it is this latter person who is alleged to have caused the land in dispute to be registered in the applicant's name. Later, he became Njogu Githinji when his mother married one Githinji Thoiti; he thus adopted one of the names of his step-father. Later he changed the name to his current one Moses Warui Githinji.

The trouble with the applicant's evidence with respect to his alleged names is that apart from what he told the court, there is no proof of any sort from which this court can trace his current name back to the name Njogu Wahome. There is simply nothing to suggest that he ever changed his identity from one name to another. If I understood him correctly, the applicant himself admitted as much in his testimony.

Change of name or identity is normally a formal exercise. For instance, one has to fill a deed poll for change of name and deposit it with the Registrar of Documents for registration under the Registration of Documents Act, cap. 285. The proposed change of identity is usually gazetted. The approved name has to be registered with the Registrar of Persons who is tasked with issuing new identity document or documents.

Whereas the applicant reserves the right to change his name for whatever reason, it is appreciated that change of identity is an elaborate exercise with legal underpinnings and procedures which must be demonstrated to have been complied with and followed to the letter. Change of one's identity is not and shouldn't be that casual, as the applicant appears to suggest, to the extent that a person can simply dump one name and adopt another at will without any proof of such a change.

But even if the court was to take the applicant at his word and agree with him that he may have changed his name from time to time, I did not find the evidence of his witnesses to be consistent with this

allegation; their evidence was, at the very least, contradictory not only as amongst the witnesses themselves but it also contradicted the applicant's own evidence. Take Joseph **Warutere Wahome (PW3)** for instance; he testified that he always knew the applicant as Job Wahome when he lived with his (the witness's) father, Solomon Wahome Gatheca. On his part **Stephen Mwangi Wahome (PW4)** who, like Joseph Warutere Wahome, testified as one of the applicant's cousins, informed the court that as far as he is aware, there is nobody by the name Njogu Wahome, in their family.

The applicant's sister, **Virginia Wambui (PW6)**, on the other hand, testified that the applicant was his younger brother who changed his name since "he did not want to be associated with animals". She testified that at the time of the applicant's birth, she was living with both parents including their father whom she identified as Githinji Thoiti. Although the applicant himself admitted that according to Kikuyu customs the first-born male child is named after his father, he was nevertheless, named Njogu Wahome. No reason was given, or at least it was not clear from the evidence of this witness why the applicant was not given his father's name only for him to adopt it later in his life.

To compound matters even further **Joseph Mwai Rutere (PW7)** testified that he knew the applicant as **Njogu Kamoche**; according to him, Kamoche was the applicant's father. He did not know who Njogu Githinji was.

In the ultimate, looking at the claimant's own evidence, one can safely conclude that even if the name Njogu Wahome is the basis of his claim on the land in dispute, there is no concrete evidence that he was identified by this particular name at any one time. And even if he was, he could not have been registered as the proprietor of this property for the simple reason that at the age of 3, he had no capacity to hold it in his own name when it was registered in 1958.

The explanation by **Githui Wa Mbiti (PW5)** that the applicant could have been registered as the proprietor of this land because Wahome Gatecha who is alleged to have caused it to be registered in his (the applicant's) name could not himself be registered as an owner of two parcels of land does not appeal to me to be plausible for two reasons; first, there is no evidence that such a person ever existed and, second, even if he existed no proof was ever provided that he was a registered owner of any parcel of land.

The evidence that one Njogu son of Wahome, or Njogu Wahome was registered as the absolute proprietor of **Title No. Konyu/Ichuga/982** as early as 1958 was not controverted; as a matter of fact, it was common ground between the applicant and the respondents.

In the absence of proof of ownership of this parcel of land, there is absolutely no basis upon which the applicant can seek the revocation or annulment of the grant on the basis that this part of the deceased's estate belonged to the applicant or that the administratrix suppressed this information from the court. In other words, there is no evidence **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** in the manner contemplated under section 76(b) of the Act.

I must add that if the applicant has any legitimate claim on the suit land, then I suppose the appropriate course would have been to sue the administratrix for its recovery rather than seek the revocation or annulment of grant made to the administratrix. The latter and the person or persons to whom the land may have been transferred, would ordinarily have been defendants or respondents in such a suit.

For all the reasons I have given, I have to reach the conclusion that the applicant has not made out a case for revocation or annulment of grant against the respondents. Accordingly, the applicant's application dated 20th August, 2010, is dismissed with costs to the respondents.

Signed, dated and delivered in open court this 28th July, 2017

Ngaah Jairus

JUDGE