REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1154 OF 2010

IN THE MATTER OF THE ESTATE OF GEDRAPH KAMAU WAIYAKI (DECEASED)

JUDGMENT

1. The deceased herein died on 9th August 2009. A letter from the Chief of Muguga Location, Kikuyu, dated 26th August 2009, states that he was survived by two individuals, being his daughters, Jackline Wangari Kamau and Caroline Wanjiru Kamau. Representation to the estate was sought in this cause in a petition filed herein on 9th June 2010 by Jackline Wangari Kamau and Caroline Wanjiru Kamau. They listed themselves as the survivors of the deceased. The deceased was expressed to have died possessed of Muguga/Gitaru/2386. The cause was gazetted on 5th November 2017, and a grant of letters of administration intestate was made to them on 22nd December 2010. The grant was confirmed on 4th June 2012 on an application dated 21st March 2012. The estate was shared out equally between the two survivors.

2. Another cause in the same estate was initiated in 2011 in HCSC No. 1596 of 2011 by way of citations meant to issue upon the administrators in the instant cause. Eventually the citors filed a petition in that cause on 24th January 2012. The petitioners in that cause were siblings of the deceased. They brought the cause on their own behalf. They listed the administrators herein as stepchildren of the deceased. They stated that the deceased had died possessed of two assets, being Muguga/Gitaru/2379 and 2386. The latter cause was never gazetted and therefore no grant of representation was made in the matter.

3. On 5th June 2012 a summons for revocation of the grant herein, dated 21st May 2012, was lodged herein, by the petitioners in HCSC No. 1596 of 2011, alleging non-disclosure, fraud and concealment of matter in the manner the grant herein was obtained. The applicants' state in their supporting affidavit that the administrators herein were not biological children of the deceased, for their mother had been married to another man prior to marrying the deceased, and she had had the two children from the earlier union. They allege that the two did not disclose that the deceased had been survived by other persons and died possessed other assets. It is averred that the assets in the name of the deceased were in fact ancestral property.

4. The reply to the application took the form of an affidavit sworn by Caroline Wanjiru Kamau on 25th June 2012. She argues that there was no misrepresentation as they were the only children who survived the deceased. She asserted that the deceased had married their mother under customary law in 1998, and that Union was solemnized in 2006. Their mother predeceased the deceased, leaving them under the care of the deceased. She argues that they had prior right, as children of the deceased, to administration of the estate over the applicants, who were the deceased's siblings. She denies failing to disclose all the assets saying that they were only aware of Muguga/Gitaru/2386. She claims that the deceased's documents were removed from his house after he died, and she says that they have now come to know that he also owned Muguga/Gitaru/2379. They denied that the deceased had gifted one of the assets to a nephew. She

concluded by asserting that she and her sister had resided in the estate throughout the deceased's lifetime. She has attached documents to her affidavit to support her case a birth certificate which indicates the deceased to be her father and a certificate of marriage demonstrating that the deceased and her mother solemnized marriage on 14th January 2006 in church.

5. The applicants swore a further affidavit on 17th July 2012 in response to the administrators reply. They reiterate that the grant was obtained on concealment of information from the court. They argue that even though the deceased and the mother of the administrators cohabited from 1998 before solemnizing their union in 2006; the administrators were born in the 1980s well before both events. They allege that prior to the death of the deceased; the administrators had been married and only came back to the property after his demise. They allege further that the estate property was ancestral land belonging to the estate of their late father, to which lineage the administrator did not belong. They further allege that prior to his death the deceased had bequeathed one of the assets to one of his nephews.

6. The two causes were consolidated on 27th June 2012 by an order of Njagi J. Directions were given on 3rd October 2012 for disposal of the application orally.

7. The oral hearing commenced on 28th April 2015. The first on the witness stand was Loise Ng'endo Waiyaki. She described herself as the daughter of the original owner of the property and a sister of the deceased. She testified that the deceased had married the mother of the applicants in 1998. She stated that the administrators did not live with the deceased and their mother, instead they would visit. She mentioned that the two children were aged about thirteen and sixteen at the time their mother married the deceased in 1998. She stated that both administrators were married by the time their mother was married to the deceased. She alleged that after the deceased died the administrators came to her to ask for the title deeds, which had allegedly been given to her by the deceased for custody. She declined saying that the matter was headed for the courts and the title documents would be presented there. She stated that the two parcels of land were originally from the estate of their father, Lawrence Waiyaki Karanja, which passed to the deceased for transmission to his siblings.

8. The next witness for the applicants was Samuel Karanja Waiyaki, a brother of the deceased. He asserted that the deceased was never married, but cohabited with the administrators in 2006. He, however, conceded that there was a church ceremony and a marriage certificate. He proposes that the two parcels of land be given to their sister, Loise Ng'endo Waiyaki, for having taken care of the deceased during illness, but she could at her discretion give a token to the administrators. He stated that the two administrators were married as at the date of the death of the deceased, and that the deceased had in fact bequeathed one of the assets to a son of Loise Ng'endo Waiyaki. He explained that the land previously belonged to their father, and upon his death it was distributed amongst the children, and each one of them got their shares.

9. The applicants' third witness was Peter Kariuki Waiyaki, another brother of the deceased. He conceded that the deceased had married the administrators' mother. He stated that the two did not have children together, and that the administrators did not join them, save that they only used to visit. He said that he was not sure that the two administrators were children of the deceased. He conceded that the deceased and the administrators' mother also went through a church ceremony. He conceded too that he and his siblings had all inherited from their father's estate.

10. The last witness on the applicants' side was Joseph Makimei Mwaura, a cousin of the deceased. He said that the deceased had told him that Loise Ng'endo Waiyaki had been assisting the deceased but he had no money to repay her, and it was only fair that he offered her a piece of land, and if she declined then the piece of land could be offered to her son. It was just the two of them talking in the absence of anybody else. He was among those who took the deceased to court.

11. The respondent administrators called two witnesses. Caroline Wanjiru Kamau told the court the deceased had been visiting their mother at the place where they were then residing before he eventually took them and their mother to his home at Muguga/Gitaru/2386. The family was then called and introduced to them. She explained that 1998 was when their mother was taken in as a wife, and that was

also when they started living with the deceased at his home. She stated that she was not married, but had a child named after the deceased. She mentioned that the family had never objected to her living on estate property before the deceased died, adding that the issues arose only after his demise. She stated that she was born in 1985.

12. Her sister, J W K testified next. She mentioned that the deceased married her mother under customary law in 1998 when she was sixteen years old, the church ceremony followed in 2006 prior to the events of 1998 she used to live with her mother elsewhere. She stated that when their mother died her remains were interred at the deceased's property, and after that she and her sister continued to live with the deceased on the property, although their aunts and uncles began efforts to drive them out. She mentioned that she was born in 1982. She also said that she was married in 2015.

13. At the close of the oral hearing I directed the parties to file and exchange their respective written submissions. Both sides complied with the directions. I have perused through the submissions and taken note of the arguments made therein.

14. The determination of the application before me depends on the outcome of only one enquiry, whether the administrators were children of the deceased.

15. The administrators have asserted that they are children of the deceased, they have produced birth certificates to support their case. They say that before the deceased married their mother in 1998 he used to visit her. After what they describe as a traditional marriage in 1998, they moved in with their mother and the deceased, and he lived with them until he died. Their mother predeceased the deceased, and left them with the deceased. The applicants counter that story by saying that the two administrators were not the biological children of the deceased. It is conceded that their mother married the deceased, and at that time the children had been born. It is argued that they did not live with the deceased, and that in fact they had been married by the time of the marriage of their mother to the deceased.

16. Whether or not a person is a child of a deceased person is matter that can be resolved in several ways. One is where the child is born within wedlock. In such case there is presumption that the couple in wedlock was the child's biological parents. Where it turns out later that the said parents were incapable of having children, then, if the infertile parent is female there would be a presumption of adoption; and if male a presumption of adoption or that the female parent begat the child with another but the male partner assumed parental responsibility. Where the child was born outside wedlock and thereafter her mother married and moved in together with the child, it is presumed that the man formally adopted the child and assumed parental responsibility.

17. 'Child' and 'children' are defined in section 3(2) of the Law of Succession Act, Cap 160, Laws of Kenya. Whether the administrators herein are to be treated as children should depend on whether they fall within that definition. The said provision says as follows –

> *'References in this Act to 'child' or 'children' shall include a child conceived but not yet born (as long as that child is subsequently born alive), and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.'*

18. It is common ground that the administrators were not born within wedlock. They have not openly asserted to be biological children of the deceased, but they imply so as they are by relying on birth certificates which name the deceased as their father. There is still a possibility that he sired them before he took in their mother as a wife. A possibility because there is no concrete evidence on it the matter. The applicants have dismissed the birth certificates pointing at the dates at which they were procured, however they did not call any evidence to discredit them. I have noted that the said certificates were obtained on diverse dates before the demise of the deceased. The applicants did not call for a deoxyribonucleic acid (DNA) test to discount the possibility that the two were in fact biological children of the deceased.

19. It is not in dispute that the two were about thirteen and sixteen in 1998 when their mother and the deceased began to live together. It was claimed by the applicants that the two were by then already married, implying that the issue of the deceased assuming parental responsibility over them could not arise in the circumstances. No concrete evidence was placed before me of the alleged marriages. The names of the persons who had married them in 1998 were mentioned. The two were minors then. It is possible that a sixteen year old girl can purport to enter into a marriage, but surely not a thirteen year old. They were underage at the time, and I am not ready to countenance the possibility that they were married. In any event, there is nothing in law that would disentitle them from inheriting their father's estate only on account of their having gotten married before the father died. The deceased died after the Law of Succession Act, which is the law which governs his estate, had come into force. There is nothing in that law that takes away the right of a married daughter to inherit from the estate of her parent.

20. Having found that the two were minors in 1998, I hold that they could not enter into any valid marriage. I am persuaded that they moved together with their mother to the deceased's home in 1998 as his children. It is common ground that one of them is still on the property. I would agree with their assertion that they remained on it with the deceased even after their mother died.

21. A copy of the funeral programme in respect of the deceased's burial has been placed on record. It has not been contested by the applicants. It is in Kikuyu, the language of the ethnic group from which the parties come. I am not Kikuyu, but am conversant with the language, due to my long association with speakers of the language and also on account of my coming from an ethnic group which is culturally and linguistically close to the Kikuyu. The two administrators are herein identified in the eulogy as children of the deceased. There is a photograph in the programme of the deceased with 'his two daughters'. The relevant portion of the eulogy says as follows in Kikuyu-

> '*KUHIKANIA GWAKE*
>
> *Mutigairi Gedraph Kamau nimendanire na mwendwa wake mwendoniri Florence Wamuyu na makahikania mwaka-ini wa 1998, na mutugo wa ugikuyu. Nimarathimiirwo uhiki wao kanithai-ini wa PCEA Joseph Ngwaci Memorial church mweri January 2005. Nimarathimirwo na ciana igiri Jacquiline Wangari na Caroline Wanjiru.'*

Which translates as follows in English-

> '*The late Gedraph Kamau fell in love with his sweetheart the late Florence Wamuyu and they got married under Kikuyu customary law in 1998. Their marriage was later solemnized in January 2005 at the PCEA Joseph Ngwaci Memorial church. They were blessed with two children J Wa and C W.'*

22. I am convinced beyond peradventure that the two administrators were the children of the deceased. It does not matter whether they were his biological children or not. There is ample material upon which I can hold that he regarded them as his children, and the family itself treated them similarly. It is not lost to me that the applicants in their cause in HCSC No. 1596 of 2011 identified them as survivors of the deceased. Indeed, their objection herein is that the two did not include them in their cause as survivors. They do not complain that the representation was sought by total strangers who were not entitled in any way to claim from the estate.

23. There is the issue of ancestral land. The argument is that the property of the deceased was ancestral. I understand the applicants to say that since the deceased inherited this property from his father, the land is ancestral and it ought not to pass to non-biological relatives of the deceased's father. That argument appears to be drawn from customary law, for there is nothing in the Law of Succession Act which supports that proposition. As stated above, the deceased died intestate after the Act had come into force. The application of Kikuyu customary law was expressly ousted by the coming into force of the Act, and in particular sections 2(1) and (2) thereof.

24. The issue of ancestral of land could imply that the deceased held the land in question on behalf of his

siblings. That does not appear to me to be the case. When the father of the deceased died, there was a succession cause in Nairobi HCSC No. 1350 of 2004. A certificate of confirmation of the grant made in that cause has been placed on record in this matter. It is dated 6th February 2006, and was amended severally. It indicates that that estate was shared out between all the children of the deceased's father, both male and female. The deceased was allotted 0.60 acres out of Muguga/Gitaru/290. It would appear that the 0.60 acres translated to Muguga/Gitaru/2379 and 2386. The applicants concede that the succession occurred and each of them got their share. The deceased was not holding what devolved to him in trust for anyone, not even his siblings. The property devolved to him absolutely. Upon his demise the same was available to the persons who legitimately survived him, who happen to be the administrators herein.

25. It was alleged that the deceased had given one of the parcels to his nephew, that is a son of one of the applicants. No evidence of the alleged *inter vivos* gift was placed before me. I have no basis therefore for holding that there was any such gift. It is notorious that disposal of land must be evidenced by a memorandum in writing. I have not seen any such memorandum.

26. In their submissions the administrators made a case extensively for dependency, saying that their mother and themselves were dependent on the deceased. That submission was needless. Dependency is provided for under Part III of the Act. The application for dependency is provided for in section 26. There is no application before me for dependency. In any event, the administrators have been provided for. The grant was confirmed in their favour. It would be pointless for them to make a case for dependency. The matter is even overtaken by events, by virtue of section 30 of the Act. The grant has already been confirmed.

27. The application for determination is for revocation of a grant. According to section 76 of the Law of Succession Act, a grant is revocable on three general grounds – defects and flaws in the process of the making of the grant, issues with administration such as failure to apply for confirmation of grant within the time stipulated and to render accounts, and where the grant has become useless and inoperative. The application before me is founded on the first general ground. The applicants argue that the administrators did not disclose that they were also survivors of the deceased and did not disclose some of the assets

28. Applications for grants of representation are guided by section 51 of the Law of Succession Act and rule 7 of the Probate and Administration Rules. Both provisions name the persons to be listed as survivors to include siblings of a deceased person, and also an inventory of the assets. The provisions are in mandatory terms. Non-disclosure of some categories of survivors has been ruled to be fatal to the process. That would the case where the survivors omitted are the prior survivors. The omission of survivors who are lesser would not have that effect. However, in both cases it has also been held that the anomaly can be cured by simply ordering that their names be included in the schedule of survivors. The same case applies to omission of property, that would not be fatal. Such omission would be curable at confirmation of grant.

29. In this case the persons omitted as survivors are the siblings of the deceased person, a deceased who had also been survived by children. Children no doubt have a superior entitlement to that of the siblings of the deceased. Under section 38, surviving children take everything to the exclusion of the siblings and anybody else. For avoidance of doubt, section 38 states follows –

> *'Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'*

30. It is my finding that whether the siblings had been disclosed or not would not have made any difference for the persons ultimately entitled to a share in the estate were the administrators, the surviving children of the deceased, that is to say Jackline Wangari Kamau and Caroline Wanjiru Kamau. The omission of the siblings was therefore not fatal, and there is therefore no case for revocation of the grant made to the administrators on 22nd December 2010.

31. I believe I have said enough. There is no merit in the revocation application dated 21st May 2012. I

shall accordingly dismiss it with costs to the administrators. The estate comprises of assets wholly situate within Kiambu County, I shall accordingly order that the cause herein, as consolidated with HCSC No. 1596 of 2011, be transferred to the High Court of Kenya at Kiambu for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE