



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1448 OF 2003

IN THE MATTER OF THE ESTATE OF JOHN KINUTHIA MUNGAI (DECEASED)

JUDGMENT

1. The deceased herein died on 12th May 2002. According to a letter from the Chief of Kiambaa Location dated 22nd July 2003, he had three children, being James Kiguru Kinuthia, Daniel Mungai Kinuthia and Wagacha Kinuthia (deceased). Representation was sought in this cause by James Kiguru Kinuthia and Daniel Mungai Kinuthia, in a petition filed herein on 3rd June 2003. The deceased was said to have been survived by the two of them, and to have had died possessed of two assets, being Kiambaa/Ruaka1715 and Gilgil/Gilgil Block 1/3912/Kikopey. A grant of letters of administration intestate was made to the administrators on 18th September 2003. The grant has not been confirmed, as their application for confirmation filed herein on 8th November 2010 was supplanted by a summons for revocation of the grant filed herein on 24th November 2010, dated 23rd November 2010.

2. It is the said application dated 23rd November 2010 that is up for determination. It is brought at the instance of John Kinuthia, Michael Wagacha Kinuthia and Irene Njoki Kinuthia. They claim to be the children of the deceased by his first wife, the late Salome Wambui Kinuthia. They base their application on the grounds that the proceedings to obtain grant were defective and that there was fraud and reliance on false statements. The administrators were said to have claimed to be the only children of the deceased and therefore suppressing information that the applicants were also children of the deceased. They state that their consent to the administrators' petition was not sought.

3. James Kiguru Kinuthia replied to the application through his affidavit sworn on 12th May 2011. He states that the applicants were not dependent on the deceased for their mother had been divorced by the deceased long before he married the deponent's mother. He avers that their father never mentioned the applicants to them, and they only surfaced after the deceased's death at the point of the distribution of the estate. He states that prior to his death the deceased had begun to transfer by gift the property that was the sole asset of the estate. He denies that the administrators had intentionally sought to sideline the applicants, saying that when they learnt of their existence they have been having meetings with them over the estate at the Chief's office. The administrators were proposing to share the land at Gilgil which the deceased had not distributed as at the date of his death be given to the applicants.

4. It is Irene Njoki Kinuthia who responded to the averments in the reply on behalf of the other applicants by her affidavit sworn on 19th September 2011. She asserts that the administrators knew all along that the applicants' mother had been married to the deceased and that she had children with the deceased. She states that the administrators even held meetings with the applicants prior to the filing of the petition.

5. Directions were given on 26th November 2013, to the effect that the application be disposed of by way of affidavits and oral evidence.

6. The oral hearings commenced on 28th July 2015. John Kamau Kinuthia was the first to take the stand. He testified that his father had two wives, Salome Wambui and Beatrice Njeri, both of whom are deceased. His mother was the first wife, who bore four children, but one died. He said he was born in 1980, and in 1985 he moved with his mother to live with his maternal grandparents. His father though supported him with his education. The deceased then fell ill with meningitis and the witness would visit him in hospital. He stated that the administrators' mother had not been married before they left their father's home. One of the administrators had not been born then, while the other came with his mother. The deceased allegedly informed him that the two were his brothers. He alleged that the deceased specifically informed Kiguru that he and the witness were brothers. He stated that both he and his siblings attended the deceased's funeral. He said they were not consulted before the administrators petitioned for representation. He said he would like to be appointed administrator.

7. James Kiguru Kinuthia testified for the administrators. He said that he got to know the applicants after the deceased died. He described them as his brothers, saying that he was told that they had been sired by the deceased. He saw them for the first time at the funeral of the deceased. He had not even heard of them prior. A month or so after the funeral, they had a meeting with the applicants at the Chief's office where they discussed about the distribution of the estate. They were unable to reach agreement. He claimed that the Chief did not know that there were two families, saying that he only learnt of it after the applicants reported to him.

8. Margaret Njeri Kariuki testified next. She confirmed that the deceased had married two wives, the first of whom left with her children. She stated that the administrators were unaware of the first family for it left before their mother was married by the deceased. She said that the applicants never came to claim land from the deceased before he died. She stated that she only knew two of the first wife's children, Kamau and Njoki. She confirmed that the children came for the deceased's funeral, she saw them. .

9. The resolution of the application before me is dependent on only one fact, whether the applicants were children of the deceased. The administrators have confirmed in their documents that the applicants were children of the deceased, whose mother had separated from the deceased or had been divorced. There is no dispute about that. That being the case then the administrators ought to have disclosed them in their petition in obedience to section 51 of the Law of Succession Act, Cap 160, Laws of Kenya, and rule 7 of the Probate and Administration Rules. These provisions are in mandatory terms.

10. According to section 76 of the Act, a grant obtained through defective proceedings, or obtained fraudulently or through concealments of facts or misrepresentation, is liable to revocation. From the facts of the matter before me, the administrators say that they got to know of the existence of the applicants at the deceased's burial. They had discussions at the Chief's office on the distribution of the estate even before they moved the court for administration. Yet, when the administrators decided to come to court they did not disclose the applicants as survivors of the deceased, neither did they inform them that they were going to court. There was therefore non-disclosure of material facts. There was concealment of matter. It could also be described as misrepresentation. The court was given the impression that the deceased was survived by only two individuals, that the other three had nothing to do with him. That must have been done fraudulently given that the administrators had by then come to know of how the applicants were related to the deceased. The proceedings to obtain the grant were therefore fraudulent. I am satisfied that a case has been made out for revocation of the grant made to the administrators.

11. Section 76 is discretionary. The court may revoke the grant, which means that even when a case has been made out for revocation it may decide not to make that order. I believe that this is case where I should not order revocation of the grant. Instead I should order that the applicants be entered into the list of beneficiaries, and that two of them be appointed administrators to co-administer the estate with the administrators.

12. The final orders that I shall make in the circumstances are:-

(a) That I appoint John Kamau Kinuthia and Irene Njoki Kinuthia administrators of the estate of the deceased in addition to James Kiguru Kinuthia and Daniel Mungai Kinuthia;

(b) That the grant of letters of administration intestate made on 18th September 2003 shall be amended accordingly;

(c) That John Kamau Kinuthia, Michael Wagacha Kinuthia and Irene Njoki Kinuthia shall be entered into the list of the survivors of the deceased;

(d) That the application for confirmation of grant filed herein on 8th November 2010 is hereby marked as spent, and the administrators appointed in (a) and (b) above are hereby directed to move the court appropriately for confirmation of the grant made to them under (a) and (b) above, in which application John Kamau Kinuthia, Michael Wagacha Kinuthia and Irene Njoki Kinuthia shall be provided for;

(e) That the said confirmation application shall be filed in court within forty-five days of date hereof;

(f) That any survivor of the deceased not in agreement with the proposals made in the application to be filed under (d) shall be at liberty to file an affidavit or affidavits of protest, and the application shall thereafter be disposed of in the usual way;

(g) That the estate comprises of assets situated exclusively outside of Nairobi, in within Kiambu and Nakuru Counties, and the parties are residents of Kiambu County, the cause shall therefore be transferred to the High Court of Kenya at Kiambu for final disposal; and

(h) That the respondents shall bear the costs of the application.

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

W. MUSYOKA

JUDGE