



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO.1565 OF 1993
IN THE MATTER OF THE ESTATE OF JOHN NDUNGU MURIMI (DECEASED)
SERAH NDUTA NDUNGU.....APPLICANT/OBJECTOR
-VS-
PETER KINYANJUI NDUNGU.....1ST RESPONDENT/ADMINISTRATOR
EDWARD MBUGUA MURIMI.....2ND RESPONDENT/ADMINISTRATOR
JUDGMENT

1. The deceased John Ndungu Murimi died on 27th February 1993. He was survived by the following beneficiaries:

- a. Esther Wanjiru Ndungu – Widow (deceased)
- b. Joseph Murimi- Son
- c. Peter Kinyanjui – Son
- d. Rachael Wanjiku – Daughter
- e. Jane Waithera – Daughter
- f. Peris Njeri – Daughter
- g. Margaret Nyambura – Daughter
- h. Phylis Wanjiru – Daughter
- i. Lucy Mugure – Daughter
- j. Serah Nduta Ndungu – Daughter
- k. Lois Wambui Ndungu – Daughter (deceased)

His estate comprised of the following:

- a. Land title No. Kabete /Nyathuna/724
- b. Half interest in Land title No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh
- c. Un-surveyed plot in Baba Ndogo Kasarani Nairobi
- d. Land title No. Kabete /Nyathuna/1051
- e. Shares in Kenya Breweries Limited
- f. Cash in Savings Account No. [Particulars Withheld] Barclays Bank of Kenya, Westlands Branch
- g. Cash in Savings Account No. [Particulars Withheld] Barclays Bank of Kenya, Queensway Branch
- h. Motor Vehicle Toyota Corolla registration number KXN 389
- i. The estate was owed Kshs.100,000/= by James Kangee Mugo being the balance of purchase price in respect of the sale of Kabete Nyathuna T.149.

2. A grant of letters of administration intestate in respect of the deceased's estate was made to Edward Mbugua Murimi (the deceased's brother) and Esther Wanjiru Ndungu (the widow) on 28th March 1994 and later amended on 12th February 2002. Esther Wanjiru Ndungu died before the grant was confirmed and Peter Kinyanjui Ndungu was substituted as the administrator on 19th April 2005. The grant was confirmed on 10th February 2010.

3. The applicant filed the present application dated 30th June 2014 under Section 76 (a) (b) and (c) of the Law of Succession Act (Cap 160) and Rules 44 and 73 of the Probate and Administration Rules. She sought the following orders:

- a. (spent);
- b. that pending the hearing and determination of the application, the administrators be restrained from alienating, wasting, disposing of, subdividing, transferring and/or otherwise dealing or interfering with the deceased's parcel of land title No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh;
- c. that the grant of representation to the deceased's estate issued to the respondents and confirmed on 10th February 2010 be revoked or annulled on the grounds that:
 - i. The grant was obtained fraudulently by making of false statements that the respondent Peter Kinyanjui Ndungu and Lois Wambui Ndungu (deceased) were the only beneficiaries of parcel of land title No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh without any portion being inherited by the applicant.
 - ii. The grant was obtained fraudulently by making of false statements that the applicant could only inherit one and a half acres of land parcel No. Kabete/Nyathuna/724 in trust for the respondent Peter Kinyanjui Ndungu.
 - iii. The grant was obtained fraudulently by making of false statements that the respondent Peter Kinyanjui Ndungu and Lois Wambui Ndungu (deceased) were the only beneficiaries of parcel of land-un-surveyed plot in Baba Ndogo Kasarani Nairobi.
 - iv. The grant was obtained by means of untrue allegations of a fact essential in point of law to

justify the grant.

d. The beneficial interest and administration of the payment of Kshs.100,000/= being balance for the purchase price of Kabete/Nyathuna/T.149 be catered for.

e. That the applicant be appointed interim administrator of the estate of the late Lois Wambui Ndungu to hold in trust for her children.

f. That an order do issue directing Barclays Bank of Kenya, Westlands and Queensway branches to produce accounts statements for A/c No. [Particulars Withheld] and [Particulars Withheld] in the names of John Ndungu Murimi.

g. That the respondent Peter Kinyanjui Ndungu be ordered to bear the costs of this application.

4. The application was supported by the applicant's affidavits dated 30th June 2014, and 30th January 2015. The following is the summary of the applicant's case; that she is a daughter to the deceased and a beneficiary to the deceased's estate. After the grant was issued to the respondents on 19th April 2005, the respondents applied for confirmation of the grant without the knowledge and consent of all the beneficiaries and annexed a schedule that indicated that the estate was to be sub-divided according to their mother's will which distribution is irregular. The respondents purported to distribute the deceased's estate based on the dying declarations of their mother who did not own anything. She did not consent to the mode of distribution of the estate adopted by the administrators and neither did her sisters. That Peris Njeri, Rachel Wanjiku and Margaret Wanjiku live in the United States of America and did not participate in the succession proceedings and neither did they consent to the mode of distribution of the deceased's estate. The signatures attached on the certificate of confirmation of grant were forged by the respondents. The respondent Peter Kinyanjui Ndungu and Lois Wambui Ndungu (deceased) were the only beneficiaries of land title No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh and un-surveyed plot in Baba Ndogo Kasarani Nairobi without any portion being inherited by the applicant. The respondents want to sell No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh without the applicant or her sisters being aware or without their consent. The respondents have depleted the deceased's accounts without the knowledge and consent of all the beneficiaries. The respondent's fraudulent acts are aimed at disinheriting the applicant together with her sisters who are lawful beneficiaries of the deceased's estate. The grant was only confirmed in 2010 and not 20 years ago as alleged by the respondents and that none of the properties mentioned in the grant have devolved to the beneficiaries and as such no prejudice will be caused if the grant is revoked and the estate redistributed fairly and equally among all the beneficiaries.

5. Phylis Wanjiru and Lucy Mugure swore further affidavits in support of the application. In summary, they state that after the death of their father, their mother and uncle (2nd administrator) took out letters of administration. Their mother passed away before the estate could be administered and the family consented to substitute their mother with their brother Peter Kinyanjui Ndungu. The 1st administrator informed them that the substitution had been allowed but not about the subdivision of the property. They have never been aware of the process of subdivision of the estate of the deceased. They only became aware after the death of their sister Lois Wambui Ndungu when they heard that their brother was selling off their father's share of Land reference No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh. They perused the succession file and discovered that the grant had been confirmed based on consents purportedly signed by them and their other sisters and the estate had been subdivided. They never consented to the mode of distribution of their father's estate as per the certificate of confirmation of grant and neither did their other sisters who live abroad.

6. The application was opposed by the respondents through their affidavits dated 5th December 2014 and 20th April 2015. The following is the summary of the respondents' case. The applicant fully participated in the succession proceedings and expressly consented to the confirmation of the grant in 1994 and to the mode of distribution of the deceased's estate. The applicant has waited for 20 years after the death of their father and when distribution of the estate is nearing completion to come to court. Before their mother died, she was an administrator of the estate and she held a life interest in the deceased's properties hence

had the authority to direct on how the deceased's estate should be distributed. Land reference No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh was owned by the deceased and one Njenga Karumba being tenants in common. When the deceased died, his portion of the land devolved to their mother and to Edward who were the administrators of the deceased's estate. Before her death, their mother directed on how she wished the remaining estate of the deceased to be distributed and the whole family agreed. The whole family consented to the allocation of the Land reference No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh to the 1st respondent and Lois Wambui Ndungu. After the passing away of Njenga Karumba in 2012, his wife Serah Gathoni Njenga stated that she wished to sell their portion of the property. It was on that premise that the administrators executed the sale agreement thereto to allow for the sale of the other half of Land reference No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh. Their sister Lois Wambui Ndungu died before being allocated her share of Land reference No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh and as such the administrators took out letters of administration to administer her estate. There is already an on-going Succession case No. 2004 of 2013 in which the applicants have applied to court for direction how the sum of Kshs.7.5 million being Lois Wambui Ndungu's share in the sale of Land reference No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh will be invested in trust for her son who is still in school. With regards to Kabete Nyathuna T.149, the transfer was already effected and the balance of Kshs.100,000/= distributed to the beneficiaries including the applicant. That distribution of the other properties was awaiting the sale of Land reference No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh as the distribution involves survey, subdivision and transfer which are expensive yet the estate has no money. The other beneficiaries are already in occupation of their respective properties having taken over the same immediately before their mother's death. That the Savings Account No. 599075 Barclays Bank of Kenya, Westlands Branch and Savings Account No. [Particulars Withheld] Barclays Bank of Kenya, Queensway Branch was closed in the 1990's when their mother was still alive and as such the administrators have no dealings whatsoever with the said accounts. If the grant is annulled, the same will have very serious effects and consequences on the beneficiaries.

7. The 2nd administrator also swore an affidavit in opposition to the application and states as follows that; for the 20 years that he has administered the estate of the deceased, he has never heard any complaint from the applicant or any other beneficiaries of the estate. All the succession processes took place in agreement of the family. He is aware that the applicant did execute the documents for confirmation of grant as to the mode of distribution of the estate. It is in bad faith that the applicant now alleges that she was not aware of and did not sign the consents as filed in court. The deceased's share in the Eastleigh property was allocated to Lois Wambui and Peter Kinyanjui Ndungu who jointly began the process of selling their portion after they were approached by Serah Gathoni Njenga. During the pendency of the sale Lois Wambui passed away and they applied for letters of administration over her estate which letters were issued and the sale completed. The prayer for injunction over the property cannot issue as the property was already sold. Over the years Lucy Mugure and Phylis Wanjiru have never complained or raised any issue with him as the co-administrator and their allegations are an afterthought and that it was the applicant's responsibility to directly liaise with her sisters abroad with regards to signing of the confirmation of grant documents and as such she cannot challenge a process that she was part of.

8. Parties testified in court they adopted their affidavits. Written submissions were filed which I have carefully considered. The following are the issues for determination:

- a. Whether the grant issued on 19th April 2005 and confirmed on 10th February 2010 was obtained fraudulently by making false statement and/or by concealing from the court of material facts?
- b. Whether all the beneficiaries of the deceased's estate consented to the mode of distribution of the estate?
- c. Whether there is need to redistribute the estate of the deceased?

9. The deceased died intestate. He was survived by his widow who partly administered the estate jointly with the 2nd respondent but she died before the grant was confirmed. The evidence as to the alleged wishes she made on how the estate would be distributed is disputed. From the evidence on record, it is clear that the process of obtaining letters of administration involved all the beneficiaries. They were all

aware of and participated in the same. The applicant together with her sisters did confirm in their testimonies and affidavits that they were aware of the succession proceedings. As such, I find no fault with the process of obtaining letters of administration.

10. What is disputed is the confirmation of the grant and the mode of distribution of the estate of the deceased. The applicant alleged that she did not consent to the mode of distribution as indicated in the certificate of confirmation. She stated that she was not aware that the grant had been confirmed and that the deceased's estate had been distributed. Her allegation is corroborated by her sisters Lucy Mugure and Phylis Wanjiru who swore affidavits stating that they never consented to the respondent's mode of distribution and that their signatures were in fact forged. The respondents on the other hand alleged that the respondent together with all the beneficiaries participated in the entire succession process and consented to the mode of distribution. Other than their conflicting statements, there was no expert involved to verify the authenticity of the allegedly faked signatures of the applicant and of Lucy Mugure and Phylis Wanjiru. I however note that the mode of distribution adopted by the certificate of confirmation of grant did not confer equal rights among all the beneficiaries of the estate of the deceased.

11. Under Section 38 of the Law of Succession Act Cap 160, the estate should be divided equally among all the children of the deceased. To the extent that the same was not done, the grant ought to be revoked. However, although a party may establish a case for revocation as is the case herein, the court rather than revoke the grant may make other orders which fit the circumstances of the case. For instance, in the case of **In the Matter of the Estate of Thareki Wangunyu aka Thareka Wangunyo (Nairobi High Court Succession Cause No.1996 of 1999)**, where a widow obtained a grant without disclosing one of her step-children and some of her own children as beneficiaries, the court held that although the matter merited revocation of the grant, it instead ordered that the stepchild left out be included in the list of beneficiaries without interfering with the grant. I find that in this case, it is not economical use of the court's time and resources to annul the entire grant. I therefore decline to revoke the entire grant. Instead, I make a finding that all the beneficiaries are equally entitled to the estate of the deceased as stipulated by Section 38 of the Act. Accordingly, and in the interest of justice, I order that the certificate of confirmation of grant issued to the respondents herein be amended to reflect that all the beneficiaries have an equal entitlement to each property.

12. The applicant being the deceased's daughter does not have a lesser right over the 1st respondent. As such, she cannot purport to hold her share of the estate in trust for the 1st respondent. Whatever share she inherits from the deceased's estate is owned absolutely by her. This applies to all the other beneficiaries of the estate. The share Lois Wambui should go to her children absolutely. Each beneficiary is entitled to a share in each asset or property. It is clear that since that application, part of the estate has been distributed and the disputed property in question, land title No. L.R. No. 36/897/1, I.R No. 7264 Eastleigh sold. I order that the proceeds from the sale be shared equally among all the beneficiaries.

13. With regards to the deceased's bank accounts, Barclays Bank of Kenya, Westlands and Queensway branches shall produce accounts statements for A/c No. [Particulars Withheld] and [Particulars Withheld] in the names of John Ndungu Murimi for verification on the transactions within sixty (60)days to the administrators. If it is established that any amounts were withdrawn by the respondents and utilised without being equally shared among all the beneficiaries, the sums will be reimbursed back to the estate and equally shared among all the beneficiaries. This being a family matter there shall be no orders as to costs. It is so ordered.

Dated signed and delivered this 31st Day of October 2017

R.E OUGO

JUDGE

In the presence of;

Absent For the Objector

Mr. Ngaca H/B For the Respondents

M/s Charity Court Clerk