



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 449 OF 1993

IN THE MATTER OF THE ESTATE OF MARTHA WANJIKU GACHUGU (DECEASED)

JUDGEMENT

1. An order was made herein on 28th September 2015 that the court file in respect of the instant cause be reconstructed from copies of documents to be availed by the person who had moved the court for the order, Margaret Waruguru Kabutha, the administrator of the estate of the deceased. From the reconstructed materials it emerges that the deceased herein died on 15th February 1993. Representation to her estate was sought in a petition lodged herein by Julius Gachugu Ndirangu and Margaret W. Kabutha, in their respective capacities as widower and sister-in-law, respectively, of the deceased. The deceased was said to have been survived by the widower and four minor children, being Eunice Pauline Njeri, Richard Rufus Ndirangu, Lydia Salvine Wairigia and Joseph William Karuri. The deceased's estate was said to comprise of money in a bank and in a savings society, shares in some firms, terminal benefits, and two plots of land. A grant was made to the petitioners on 9th June 1993. The widower died on 22nd February 2014, which necessitated that the grant be amended, on 9th June 2015, leaving Margaret Waruguru Kabutha as the sole administrator. The grant was confirmed on 16th February 2016, distributing the estate equally amongst all the four children of the deceased.

2. I am called upon to determine two applications, dated 6th May 2016 and 13th June 2016. The application dated 6th May 2016 is for rectification of the certificate of confirmation of grant, essentially to correct the name of one of the beneficiaries. In the certificate her name is recorded as Lydia Warigia Marie, while the administrator says the correct name ought to be Lydia Salvine Warigia Maric. The application is not opposed. The second application, dated 13th June 2016, is a summons for revocation of grant founded on section 79 of the Law of Succession Act, Cap 160, Laws of Kenya. The applicant, from the grounds on the face of the application and the facts deposed to in the affidavit, is not complaining about the process of obtaining the grant or administration thereof or of the grant having become useless or inoperative. Her concerns arise from the process of confirmation of the grant. She says that the two plots of land did not form part of the estate, and should not have been distributed. She asserts an interest in the subject plots on account of the joint-ownership thereof by the deceased and the late administrator, who was the husband of the deceased and the applicant. The administrator swore an affidavit on 15th June 2016 in reply to that application. She avers that the applicant was a widow of the late husband of the deceased having been married in 1997 after the deceased died in 1992. She states that the two assets disputed by her were acquired before she was married, the title documents attached show that Nairobi/Block 111/1437 was registered in the name the deceased, Martha Wanjiku Gachugu, on 19th July 1990.

3. I directed on 15th June 2016 that the two applications be disposed of simultaneously by way of affidavit and oral evidence.

4. The oral hearing commenced on 26th October 2016. The applicant was the first to take the stand. She said that she did not know the deceased, although she described her as a person that her late husband had married, and who died before she herself got married to her late husband. She alleged that she had cohabited with her husband from 1996 before they solemnized their marriage in 1997. She described the administrator as a sister of her late husband. She testified that when the deceased died in 1992, the administrator and her late husband obtained representation to her estate in 1993, which she acknowledged was before she was married. She stated that Nairobi/Block 111/1437 was acquired by mortgage, and that when she got married she found the development of the property in progress, and that she chipped in in completing two additional units. The other property, Plot No. 32, was also acquired prior to her marriage, and was in the name of the deceased and her late husband. She stated that the plot was developed in 1999. She said that she founded her protest on the developments on both plots, although she conceded that she had no documents to support her alleged role in the alleged developments as she did not keep any records. She claimed to have had continued from where the deceased left off. She asserts to be the rightful heir on account of being the surviving widow of their late husband. She stated that she had no interest in the rest of the assets.

5. The respondent's case was stated by the administrator. She testified that the deceased was the wife of her late brother, and that upon her death she had obtained representation to her estate jointly with her late brother. She testified that Plot No. 32 was bought jointly by the deceased and her husband, and the husband wanted to give it to her. She said that Nairobi/Block 111/1437 was registered in the name of the deceased, and that it was the deceased who bought it, for she and the witness used to work at Kenya Commercial Bank and she was privy to the loan arrangement with the bank for the deceased to acquire that property. The property was allegedly developed immediately. She said that the applicant lived at Buru Buru, in a house belonging to her late husband.

6. I must begin by stating that the applicant appears to be unhappy with the confirmation process, and not with the processes envisaged by section 76. A grant is revocable under that provision where the process of obtaining it was attended by flaws or fraud, or where the administrators maladminister the estate by failing to seek confirmation within the time mandated by the law or to proceed diligently with administration or fail to render accounts as and when required, or where the grant has become inoperative or useless as in cases where a sole administrator passes on. There is no discretion given to the court under section 76 to revoke grants on account of problems or difficulties with the confirmation process. So on that score the application before me is grounded on the wrong provisions. A party unhappy with orders made at confirmation of grant should move the court for review or setting aside of the confirmation orders but not for revocation of the grant itself.

7. The deceased in this case was the late wife of the applicant's husband. She was not a co-wife of the applicant given that the applicant was married after her demise. This cause relates to her estate. The persons listed in it are her children. The applicant is not a survivor of the deceased, for she does not have the capacity of any of the persons listed in sections 35, 36, 37, 38 and 39 of the Law of Succession Act. Surviving spouses and children have priority over everybody else. She is neither. She is not qualified under section 66 of the Act to apply for representation to the estate of the deceased. Neither is she among the persons who ought to have been disclosed as per the requirements of section 51 of the Act. So, even if she were to bring an application for revocation of the grant founded on any of the grounds set out in section 76 of the Act, her application would have no chance whatsoever in the circumstances.

8. The matter before me turns on only one point – whether Nairobi/Block 111/1437 and Plot No. 32 belong to the estate of the deceased or that of her late husband.

9. A copy of the title deed for Nairobi/Block 111/1437 is on record. It indicates that the property was registered on 19th July 1990 in the name of the deceased. There is nothing on the face of the document to indicate that it was ever owned, whether singly or separately or jointly, by her late husband. The applicant has not provided any material to show that the property was owned at any time by their late husband, or that he had acquired it solely but caused it to be registered in the deceased's name to hold it in trust for him, nor that he had owned it either jointly or in common with the deceased. She merely asserts that she developed it. She has provided no documentary proof of that allegation. Even if she were to expend her

money on the property, no doubt she would have been doing so on a property that she had absolutely no interest in, and, if that was the case, she would not have acquired any interest whatsoever in the property by development.

10. Plot No. 32 was not registered as at the date of the deceased's death under the relevant land legislation. What is on record is a Plot Allocation Certificate No. 1368 issued on 22nd August 1986 by Mutirithia wa Andu Co. Ltd. The certificate records the deceased and her late husband as the registered owners of Plot No. 32, according to the records of the firm. It is not indicated in the certificate whether the property was owned jointly or it was a co-ownership. That would have become clear no doubt at the registration of the property under the now repealed Registered Land Act, Cap 300, Laws of Kenya, or its successor, the Land Registration Act, Act No. 3 of 2012. In the circumstances, whether the applicant has any claim to the said property would depend on the nature of their late husband's interest. If the property were owned jointly, both owners held the whole in undivided shares, and upon the predecease of the deceased, her interest united with that of their late husband by the principle of *jus accrescendi* or survivorship, so that it became the sole property of their late husband. That would mean that the same was not available as an asset in the estate of the deceased, but as that of their late husband, and the applicant would be justified to claim a share of it. If it were co-owned, it meant that both owners held a half share to the property, and upon the pre-decease of the deceased her share formed part of her estate, while their late husband was entitled to the other half-share. The effect of that would be that the applicant would be entitled to claim a share in her late husband's share, of course together with the children of the deceased by his first wife.

11. What I find curious is that after the deceased died, her late husband sought representation to her estate and listed Plot No. 32 as an asset therein. He did not state that she was only entitled to a half share in it. Yet, he must have known that the document issued to them by Mutirithia wa Andu Co. Ltd had listed both of them as owners thereof. That would suggest that he did not regard the property as jointly owned in common with the deceased, but rather treated it as wholly owned by the deceased. That appears to tie up with the claim by the administrator that her late brother had always intended to let the deceased have it.

12. I note that the property was acquired before the applicant married their late husband. She has not laid any material before me that would suggest that she developed the property. I am persuaded that by listing the property as an asset in the estate of the deceased their late husband regarded the property as not belonging to him, but to his late wife. It would do justice to let matters remain that way. I have perused the file in HCSC No. 923 of 2014, in the matter of the estate of the late husband of the deceased and the applicant; he left behind several assets, apart from Nairobi/Block 111/1437 and Plot No. 32. I believe that that is what the applicant is entitled to a share in, should it turn out that she was validly married to the deceased.

13. I was urged by the applicant to order consolidation of HCSC No. 923 of 2014 with the instant cause. That plea was objected to by the administrator, who urged that there was no basis for the consolidation prayed for, saying that I should only look at the contents of the file in the course of writing the judgment. I have perused the record in HCSC No. 923 of 2014, and I agree with the administrator. The causes relate to the estates of two different persons. There cannot be any reason to have the two causes to be consolidated. After perusing it I found it useful in terms of guiding me in the determination of some of the issues arising herein.

14. In view of what I have stated above, I shall dispose of the two applications in the following terms -

a. That the application dated 6th May 2016 is allowed, and the certificate of confirmation of grant dated 16th February 2016 shall be amended accordingly;

b. That the application dated 13th June 2016 is hereby dismissed;

c. That the cause in HCSC No. 923 of 2014 shall not be consolidated with the instant cause for the two relate to estates of different persons, and the two shall henceforth proceed separately; and

d. That each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 13TH DAY OF OCTOBER, 2017.

W. MUSYOKA

JUDGE