



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 820 OF 2009

IN THE MATTER OF THE ESTATE OF GIBSON GITHINJI GITONGA (DECEASED)

LUCIA WANJIKU GITHINJI.....PETITIONER/RESPONDENT

VERSUS

ANNA MUTHONI GITHINJI.....APPLICANT/OBJECTOR

RULING

1. Gibson Githinji Gitonga died intestate on 10th February 2009 at Thika. His widow Lucia Wanjiku Githinji (petitioner) petitioned this court for grant of letters of administration intestate in which she stated that the deceased was survived by one wife, herself and six adult children. The same was issued to her on 21st September 2009.
2. The applicant herein filed summons for revocation or annulment dated 29th October 2009 seeking the revocation of grant issued to the petitioner herein on the grounds that: the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by the making of a false statement and by the concealment from the court of something material to the case; the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant; and that the administrator has failed to administer the deceased's estate as required by law.
3. In the affidavit sworn by the applicant in support of the summons for revocation, she averred that she was a widow of the deceased having been married to him under Kikuyu Customary Law as a 2nd wife. She stated that their union was blessed with two sons; Charles Mbogo Githinji and Alex Waweru Githinji. She further averred that that proceeding to obtain the grant herein were defective as she as well as her two sons were not named as beneficiaries of the estate of the deceased neither were they involved in the petition at all. She further listed several properties which were not listed by the petitioner in her petition for grant stating that the same were concealed from the court and are assets forming the estate of the deceased. The applicant stated that she had been staying with the deceased for 15 years at Landless estate in Thika before his demise and he would cater for all her family expenses. She further averred that the petitioner made an untrue allegation of fact in her petition by alleging that every person having an equal or prior right to a grant of representation had consented or renounced their right, while this was not the case as she together with her two sons were not involved in the said petition neither did they renounce their right. It is for these reasons that she prayed the grant issued to the petitioner herein be annulled and proceeds from the estate of the deceased be deposited in the court until the matter is finalized and proper administrators appointed by the court.

4. The application was opposed by the Petitioner through her replying affidavit dated 27th January 2010. The application was disposed by way of viva voce evidence with the applicant testifying and calling two witnesses in support of her case. PW1 Jackson Mahinda Gitonga is a younger brother to the deceased. He testified that the deceased had two wives, the petitioner and applicant herein. Though he could not recall the year the deceased married the applicant, he stated that he attended the dowry negotiations with his two wives Grace Muthoni Mahinda and Grace Njeri Mahinda. PW2 Stephen Murachuri Waweru is the father of the applicant. He testified that the deceased married his daughter on 15th September 1998 under Kikuyu Customary law having co-habited for three years and dowry of Kshs.10,000/ as well as a memorandum to that effect signed. The applicant herself testified as PW3 and reiterated that she had been co-habiting with the deceased since 1995 before traditional rights of marriage were performed in 1998 in the presence of elders. She relied on her affidavits dated 29th October 2009 and 8th February 2010.

5. The petitioner on her part testified herself and called two witnesses in support of her case. It was her case that the applicant was never married to the deceased as she was married to the deceased on 8th January 1972 under the now repealed African Christian Marriage and Divorce Act and therefore the deceased lacked the capacity to contract a subsequent marriage. She stated that the applicant herein was an employee of the deceased working as a sales person in his shop. DW2 David Gitonga testified that he knew the deceased who was married to one wife, the petitioner herein. He did not know whether the deceased had another relationship apart from that with his wife the petitioner. DW3, Samuel Njoroge is a brother to the petitioner. He reiterated that the deceased was married to only one wife, the petitioner and that he had two homes, one in Thika and another in Mang'u.

6. The above is the summary of the pleadings and evidence tabled before the court. The issues for this court's determination is whether the applicant herein is a wife of the deceased, and whether her two children are children of the deceased, and hence entitled to a share of his estate as beneficiaries. The second issue is whether the grant issued to the petitioner should be revoked on the grounds alleged.

7. It has been stated that an objector claiming to be the customary law widow of the deceased has to establish that fact by concrete evidence (**GACHIGI -V- KAMAU (2003) 1 EA 69**). Did the applicant herein satisfy the court that she was indeed a customary law widow of the deceased? Evidence was adduced to the effect that the deceased and the petitioner were married on 8th January 1972 at St. Andrew's Church, Thika under the now repealed African Christian Marriage and Divorce Act. It would appear that subsequent to this marriage the deceased started co-habiting with the applicant in the year 1995 and later formalized their union in 1998 by getting married under Kikuyu Customary Law. This was supported by two witnesses called by the applicant; PW1 a brother to the deceased who was present during the dowry ceremony and PW2 the applicant's father. In my view this is sufficient evidence that she was indeed married to the deceased under Kikuyu Customary Law. I also note exhibit "**AMG1 (b)**" a Joint Statutory Declaration duly signed by the deceased and the applicant herein dated 13th May 2002. The same is to the effect that the applicant and the deceased were duly married under Kikuyu Customary Law and was sworn in support of an application for the applicant to change her maiden name and adopt the deceased's surname as her marital name. Looking at the totality of the evidence therefore, I find that the applicant is a wife of the deceased married under Kikuyu Customary Law.

8. The petitioner's case is that since the deceased was married to her under the now repealed African Christian Marriage and Divorce Act in 1972, he had no capacity to contract a subsequent marriage whatsoever. This is not true taking into account the provisions of **section 3(5)** of the **Law of Succession Act** which provides that:-

"Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."

9. Accordingly, the applicant having been married under Kikuyu Customary Law that permits polygamy, she is a wife for purposes of succession notwithstanding that the deceased had previously contracted a

monogamous marriage between himself and the petitioner.

10. The second issue for determination is whether the two children of the applicant are children of the deceased. **Section 3(2)** defines "child" or "children" as; " **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.**"

11. The applicant stated that her two children, Charles Mbogo Githinji and Alex Waweru Githinji, were children of the deceased for whom the deceased used to cater for all their expenses including their school fees. She produced copies of their birth certificates which indicated the deceased as their father. In the absence of any proof that the said birth certificates were fraudulently obtained, I find them to be sufficient proof that the deceased was the father of the applicant's two sons.

12. Having found that indeed the applicant is also a widow of the deceased and her two sons' children of the deceased, it thus follows that they are beneficiaries entitled to share in the estate of the deceased. The applicant and her children had a right to be involved in the petition for grant. I find that the petitioner deliberately concealed from the court their existence with the clear intention of disinheriting them. This contravened the provisions of **section 51(g) of the Law of Succession Act** which required all the beneficiaries to be disclosed at the time of filing the petition. This amounts to concealment from the court of something material to the case which warrants a revocation of the grant under **section 76(b) of the Law of Succession Act. In the Matter of the Estate of DAVID KAMETHU ALIAS DAVID MAINA KINYANJUI (Deceased) Nairobi H.C P & A No.1301 of 2002**, it was stated that failure to disclose a beneficiary is a material matter that should lead to the revocation of the grant.

13. **Section 51(1) (h) of the Law of Succession Act** requires a petitioner to give a full inventory of all the assets and liabilities of the deceased. The petitioner herein in her petition left out certain properties forming the estate of the deceased. This amounts to concealment of a fact material to the case which is a ground for revocation under **section 76(b) of the Act**. I further note that the objector's consent to the petition for the grant as well as the consent of her two sons was not sought nor obtained. This goes against the provisions of **rule 26(2) of the Probate and Administration Rules** which mandated the petitioner to obtain consent to the making of the grant of letters of administration intestate to a person of equal or lesser priority (**In the Matter of the Estate of MARIOKO NJERU MIGWI (Deceased) [2014] eKLR**). The applicant and her two sons are persons of equal priority and did not execute any consent in favour of the petitioner/respondent nor did they renounce their right to petition for the grant. As such the proceedings to obtain the grant were defective in substance and for this reason should be revoked.

14. In conclusion, the grant issued to the petitioner on 21st September 2009 is revoked. A fresh grant shall issue jointly to the petitioner and the objector. The objector shall have the costs of this application.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2016

M.W. MUIGAI

JUDGE

In the presence of;

Wachira for the Applicant.