



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.1332 OF 1990

In The Matter Of The Estate Of Wilfred Thandi Kibutha (Deceased)

JUDGMENT

1. The application coming for consideration is the Notice of Motion dated 11th August 2003. The application is brought under Section 76 of the Law of Succession Act Cap 160. The applicant seeks the following orders;

- i. That the proceedings to obtain the grant were defective in substance in that all the beneficiaries were not included.
- ii. That the grant was obtained fraudulently by making false statement or by concealing from the court of something material to the case.
- iii. That the costs of this application be provided for.

2. The application is supported by the affidavit of Teresia Njeri Gicharu, she avers that the deceased was a brother to his late husband Stephen Gicharu Kibutha. That demarcation took place in 1958 when her husband was in detention and he was released in 1959. That during the said demarcation the family resolved that the said parcel of land **L.R. NO. Dagoretti/Rumuruti/208** be registered in the name of his brother the late Wilfred Thandi as a trustee for her late husband but when the deceased's widow filed the succession proceedings she omitted to include her name and that of her 8 Children as beneficiaries to the said land. That the land was family land and not self-acquired and that they had even done a case before the chief to determine their respective entitlement. That her late husband had lodged a caveat on the said land in 1986 when he realized that the deceased was not willing to give him his share of the suit land adding that she and her 8 children have been living in the suit parcel of land since she got married to her late husband back in 1947. That she and her children have nowhere else to go as the suit parcel of land was her husband's only inheritance. She avers that though the deceased's names appear on the title document she and her children have a beneficial interest on the suit land and that she was not aware that the deceased's widow had applied for grant of letters of administration omitting her and her children and she only learnt of the same when the deceased's widow filed **HCCC 2420 of 1992** against her and her son seeking to evict them from the suit parcel of land. That she and her children were not aware of the application for grant to raise an objection yet the deceased knew they had interest in the suit land as they had pursued the matter with the elders. That the said letters of administration was confirmed with the said concealment of facts.

3. The application was opposed, George Kibutha Thande in his replying affidavit filed in this court on 21st June 2006 deponed that the deceased widow died on 22nd August 2004 and they were in the process of taking out letters of administration. He avers that Teresiah Njeri Gicharu has no right of claim as expressed in the preliminary objection dated 11th September 2003. That by virtue of section 29 Law of

Succession the applicant is not a dependant adding that the deceased only allowed her and her family to dwell on ¼ an acre of the suit parcel of land where her husband was buried. That the said proceedings adduced as evidence by the applicant was given in the absence of the deceased hence are not valid. That the applicant has no beneficial interest in the suit land as the same belongs to the deceased and was lawfully registered in his name.

4. I have read and considered the parties affidavits and oral submissions by their respective counsels. The grant of letters of administration of the deceased was made to Marion Wanjiku Thandi on 13th June 1991. On 14th July 2013 the deceased's widow, Marion Wanjiku Thandi applied for the confirmation of the said grant of letters of administration and the same was confirmed on 1st October 1993 listing herself and her 3 sons namely; George Kibutha Thandi, Hudson Mukiri Thandi and Peter Gicharu Thandi as the only beneficiaries to the deceased's estate. The said confirmation also listed the suit parcel of land **Plot L.R. Dagoretti/Ruithimitu/208** as one of the property's surviving the deceased and which was shared out by the said beneficiaries.

5. The applicant claims that she and her children were omitted in the list as beneficiaries on basis that the deceased held the suit land in trust for her late husband. The respondent on his part rejects this claim and argues that the said land was solely the deceased and that the applicant had been allowed to live on a ¼ with his family as that is where her husband was buried. The applicant sought a revocation of the said confirmed grant as provided for under section 76 of the Law of Succession Act Cap 160 which provides that in her application section 76 of the law of Succession Act which provides that, "A grant of representation, whether or not confirmed, may at anytime be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;"

The applicant bases her argument on Section 76(a) and (b) and argues that she and her children were not named as beneficiaries to the deceased estate. The applicant claims that the suit land was registered in the deceased's name during demarcation in 1958 on his behalf and on behalf of the applicant's late husband and as such she claims that she and her children had interest on the share that was entitled to her husband. Section 29 of the Law of Succession Act seeks to define who is a dependant and provides thus, "For the purposes of this Part, "dependant" means- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

From the above definition neither the applicant nor her children qualify as dependant's within the meaning of the Act. However the applicant claims a beneficial interest in L.R No. Dagoretti/Ruthimitu/208

6. The applicant basis her claim on trust. It is trite law that he who alleges must prove. The objector alleges that the deceased held the suit parcel of land in trust for his siblings. In the case of **Mumo –vs- Makau (2004) 1 KLR 13**, it was held that a trust is a fact that has to be proved by evidence. The legal burden to prove the existence of the trust rests with the one who alleges it. To discharge this burden, the objector claims that the suit properties was inherited from their late father and was to be held by the deceased in trust for him and the other siblings.

The applicant is support of her claim has adduced a letter from Chief Office Kangemi dated 12/11/87

stating that it had been agreed that the deceased gives Gicharu Thande 1 acre from the suit land. There is also a copy of a notice of registration of caution on the suit land by the applicant's husband on basis of securing his beneficial interest. The respondent on their part though they denied the said allegations did not comment on the documents adduced by the applicant. The applicant has demonstrated that she has a beneficial interest in L.R No. Dagoretti/Ruthimiti/208. It is apparent from her attached exhibits that the parties have been before the chief over her share in the said land. The grant the applicant seeks to revoke was confirmed in 1993 about 23 years ago. The applicant is not a dependent but can sue the respondent for the part she claims to be belonging to her family. I therefore decline to revoke the grant as sought. No orders as to costs. It is so ordered.

Dated, signed and delivered this **29th** day of **July** 2016.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Objector Applicant**

.....**For the Respondent**

Ms. Charity

Court Clerk