



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.209 OF 1994

IN THE MATTER OF THE ESTATE OF DANSON MACHARIA (DECEASED)

GIDEON MUNGAIPETITIONER

VERSUS

KEZIA WANJA MWANGI.....OBJECTOR /APPLICANT

JUDGMENT

1. The succession proceedings relate to the estate of the late Danson Macharia, who died intestate on 30th October, 1983. The deceased's wife Phyllis Wanjiku Macharia and Gideon Mungai petitioned this court for grant of letters of administration intestate on 28th December 1993. They were issued with the said grant on 20th April 1994. Later on the petitioners via summons dated 24th October 1995 applied for confirmation of the said grant.

2. This prompted the respondent/objector to file an affidavit in protest dated 24th April 1998 and summons dated 13th November 2001 seeking revocation of the said grant on grounds that for revocation of the grant on grounds that the petitioner failed to disclose that the deceased had two wives and 7 other children and that he also failed to include *Nyandarua/ Malewa/192* and *plot 770 situated in Bahati Nakuru*. This application was withdrawn by consent of parties in court before Justice Waweru on 2nd June 2009 who also directed the summons for confirmation dated 24/10/1995 to proceed for hearing with parties being advised to file their affidavits in support of allegations that the objector had been settled elsewhere by the deceased and was therefore not entitled to a share in *Title No. Nyandarua/Melava/192*.

3. The petitioner in his affidavit dated 11th September 2008 avers that Phyllis Wanjiku Macharia one of the administrators died in January 2001 during the pendance of the cause leaving Gideon Mungai as sole administrator. The administrator was on 1st February 2005 appointed as Guardian Ad litem of Isaac Waithaka who was mentally ill and personal representative of the late Mary Nduta Macharia his wife who is deceased. That before the death of the deceased in 1968 he had settled the respondent in Mutukanio Farmers Co. Ltd, Ngarua Kinamba namely plot no.1449 at Nakuru Njoro area where she stayed with her two issues of the marriage. This he avers was a clear indication that the deceased wanted to keep the objector far away from parcel of land Title No. *Nyandarua/Maleva/192*. That the said parcel of land was still on loan from Settlement Fund Trustees and Phyllis Wanjiku Macharia and her children continued paying the same with no contribution from the respondent. In support of this the petitioner attached statements showing payment to the said Settlement Fund Trustees.

4. The objector in her replying affidavit dated 24th September 2008 avers that the administrator does not know the family affairs well as he was only married to her co-wives daughter and related to them as a

son-in law. She avers that she was married to the deceased under Kikuyu customary law but denied allegations that she and the deceased separated sometime in 1968. That being the only widow surviving the deceased she ranked in priority to the administrator and hence is entitled to the grant of letters of administration. She denied allegations of having been settled by the deceased in **Sipili/Ndonyoloip Block 2/1449** claiming that she purchased the said parcel of land herself from money she got when she was working. She sought to correct the administrator stating that she had 7 children and not 2 as alleged. She avers that the deceased did not provide for her and her children and as such they were entitled to inherit from his estate. Further, she stated that she was currently residing with her children on **Title No. Nyandarua/Melava/192** together with her children and her co-wife's children.

5. Parties appeared in court on 14/10/2008 for hearing of application dated 13th November 2001. Justice Jeane Gacheche declined to rule on the matter since the application was no longer on record.

6. This prompted the objector to file a similar application via summons dated 16th June 2009 seeking revocation of grant on ground that the same was obtained fraudulently by making a false statement and by concealment from court of something material to the case. That the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant.

7. The petitioner in opposition to the said summons filed his replying affidavit dated 16th March 2010. He reiterated the averments in his affidavit dated 11th September 2008 and proposed mode of sharing of the said parcel of land **Nyandarua/Malewa/192** as follows; Stanley Ndungu - 12 acres, Isaac Waithaka- 9 acres, Francis Njoroge-9 acres Samuel Kamau -9 acres, Serah Njeri-5acres, Grace Wambui-3 acres, Jane Wabuthu-3 acres.

8. The petitioner filed for confirmation of grant via summons dated 31st May 2010 seeking confirmation of grant of grant of representation issued by this court on 20th April 2010.

9. The matter came before Justice Lenaola on 21/06/2011 issued direction to the effect that the application dated 16th June and one dated 31/5/2010 be heard together and the court determine whether Keziah Wanja Mwangi was a widow to the deceased and if so what share she is entitled to. The grant to be confirmed on the final determination of the two issues, witness statements, and affidavits to be filed and exchanged within 30 days. The said matter was fixed for hearing on 26/9/2011.

10. This matter proceeded viva voce before Justice Mugo on 18/06/2012. PW1the petitioner stated that she married the deceased in 1957 but there was older wife called Phyllis. That she and the deceased had 7 children with the deceased and was currently living with 2 daughters but 2 are deceased with whom she lives with at their matrimonial home. That at the time the deceased died he was living at the Wanjohi land and he went to work at Egerton in 1999 where she used to stay but would go home now and then. She testified that the succession cause was filed by Gideon Mungai and Phyllis Wanjiku. Gideon is married to Phyllis's daughter. She stated that Phyllis had 8 children. That the deceased was buried in the land in dispute which she estimates to be about 49-50 acres. She testified that the said land is supposed to be divided equally into two according to Kikuyu customary law for her and Phyllis to share. She testified that she was divorced in 1968 by the deceased in front of the entire family. She denied having been given any land in Ngarua and stated that she bought that land herself by ballot. That during the said period she kept going home and the deceased even used to visit her at her place of work. That before the deceased died the children used to visit him and the deceased would even pay their school fees. In her defence she stated that she filled the objection 8 years after the letters of administration were taken out because she was not aware of the same and only learnt the same in 1996. That during the said period she had agreed that her co-wife could continue using the land to raise fees for her children since she was employed at the time. That the same was discussed with the assistance of Waithaka the deceased's younger brother unfortunately they did not write anything down. She stated that nobody informed them of the deceased's death and that she went 3 days after he had been buried. She denied allegations that she was being assisted by her brother in-law to re-enter the land for a share of the same stating that he has his own land. She stated that she built in one of the ½ share of the land entitled to her before she retired.

11. PW2 Isaac Waitahaka a brother to the deceased stated that his late brother was married to Phyllis and Keziah. That he married Keziah in 1956 under Kikuyu customary law and she bore the deceased 7 children but 2 have since died leaving her with 5 children. Whilst Phyllis had 8 children. That before her death Phyllis and Keziah lived in Melava Scheme in Wanjohi which land belonged to the deceased. He stated that as far as he was concerned Keziah and the deceased did not divorce nor separate from the deceased.

12. On cross-examination he stated that the land at Melava was given to the deceased in 1963 by the Settlement Trust Fund. That at the time the deceased died Keziah was at Egerton and did not know of the burial. He denied any allegations of having witnessed any divorce proceedings between Keziah and the deceased in 1968.

13. Gideon Mungai DW1 testified that he is married to Sarah Njeri the daughter to Phyllis was appointed as an administrator after the death of Danson Macharia in 1983 having been appointed by the deceased's family since at the time none of the children were old enough. That he and Phyllis Wanjiku both acting as administrators filed the succession cause in 1994 this was after the children reached the age of majority. However, he become sole administrator in 2001. He stated that the family knew him from a young age. At the time 7 children of the deceased were alive but Mary Nduta died. He stated that he wanted to be appointed as an administrator as he was in charge of everything and was the guardian of Isaac Wathaka one of the deceased's children who was mentally unstable. That Isaac was given 9 acres but admits that Nduta was not given any land. He refutes allegations of holding 14 acres of land. He testified that he met Keziah when he went to their home as an in-law in 1979 the same year he married his wife Sarah. He testified that Phyllis's children live in plot **Nyandarua/Melava** 192 as that is where they call home. He stated that the children did not ask him to stay there that they only brought him a letter from the head men but he indicated to them that the case was in court. That the land was not yet subdivided and there was a loan. That they paid Kshs. 10,000 towards the said loan and had receipt to support the same. That when he went to get the title he was told that there was a caution registered on the said land. At the time the land was valued at Ksh.100, 000/-. He indicated that the deceased had paid the loan before he died and as such they had stated in the grant that he had nil liabilities only to discover that there were monies to be paid to the bank. They learnt that the land had been bought. Further, he stated that Keziah could not inherit as she was not a child to Wanjiku.

14. On re-examination he stated that he was not a beneficiary of the said estate and that the beneficiaries still wanted him to continue administering his estate.

15. John Mwangi Ngari testified that the deceased was his elder brother and further stated that he knew Keziah as his wife with whom he had separated with in 1968. That she left her matrimonial home and went to his father's home where she stayed for 7 months and cultivated potatoes for one season. On learning this, the deceased wrote to her and asked her to leave and when the village elder read the letter she was asked to leave and she did in 1979 the same year his mother died. Their father asked them to go bury her as he was old but he did not attend the burial since he was doing his CPE. He stated that he heard the deceased say that he had bought Keziah a shamba at Ngarua. He stated that Keziah did not attend the deceased's funeral. He stated that Njeri Mwangi is their stepmother. He stated that he saw Keziah in 1968 when she went asking for her portion of Malewa land.

16. The parties filed written submissions. The objector in her submissions pointed out issues for determination as follows;

- i. Whether the application for confirmation of grant is merited?
- ii. Whether the proceedings to obtain a grant were defective in substance
- iii. Whether the grant was obtained fraudulently by making of false statements or concealment of material information
- iv. Whether the grant was obtained by means of untrue allegations of facts in law to justify the

grant

v. Whether the revocation of grant is merited?

17. It was submitted that the application for confirmation of grant cannot be allowed as it has failed to meet the conditions of section 71 (2) of the Law of Succession Act, Cap 160 which provides that, *“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”*

18. That the petitioner has not identified all persons beneficially entitled to the deceased's estate and as such the same cannot be allowed. That the petitioner did not seek consent of members of the 2nd house or cite them as she as the widow to the deceased and her children ranked in priority to him being a son in law. That Rule 40 (3) and (4) of the Probate and Administration Rules provides that, *“(3) Save in the case of whole or partial intestacy or where the application is brought by virtue of section 71 (3) of the Act, there shall be filed with the summons an affidavit containing the following information and particulars so far as known to the applicant-*

(a) the names, ages and addresses of the children of the deceased by whom he was survived (whether or not they were being maintained by him immediately prior to his death) and of such of his parents, step-parents, grand-parents, grand-children whom he had taken into his family as his own, brothers, sisters, half-brothers and half-sisters, as were living at his death and were being maintained by him immediately prior thereto with full details of the manner and extent and for what period they were being or had been so maintained;

(b) in the case of a male deceased, his wife or wives or former wife or wives living at his death and, in the case of a female deceased, her surviving husband if he was being maintained by her immediately prior to her death with full details of the manner and extent and for what period he was being or had been so maintained.

(4) Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.”

It was submitted that the petitioner failed to include the 2nd house as beneficiaries to the deceased.

19. It was further submitted that the proceedings were defective because the petitioner deliberately failed to disclose all the beneficiaries of the estate and also failed to disclose all the assets making up the estate of the deceased by leaving out a parcel of land known as **Nakuru/Bahati/770** which formed grounds for revocation as provided for under Section 76 of the Law of Succession Act, Cap 160 which provides that, *“A grant of representation, whether or not confirmed, may at any time 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;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently”.

20. That the petitioner does not rank in priority to the objector or her children as provided for under section 66 which provides that, *“ When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-*

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee;

As such the petitioner was supposed to seek consent of the objector and her children as they rank in priority to him. He relied in the case of **Kiama Gathuri Ngara & Another V Teresa Wangui Ngara [2015] eKLR**

21. That the two daughters of the deceased said to have given consent were underage at the time of the filing of the said petition. On this she relied on the case of **In the matter of Abdulrahman Omar Cheka (2007) eKLR**, where it was held that, “Only Salma had, therefore attained the age of majority. All others were minors, who could not and therefore did not, consent. **In the matter of the estate of Scholastica Wanjiru Wanyee (deceased)** Lady Justice Koome stated, “*the other beneficiary Wanyee Nyambura is a minor and he is not capable of giving a consent*”.

22. That the petitioner made reckless statement and it is only fair and just to find that the grant was obtained through misrepresentation and concealment of the facts and as such the same should be revoked. She relied on the case of **Nyarua Kirogo -v- David Njuguna Kirogo [2015] eKLR** , where it was held that, “*As earlier stated the grant would not have been issued to the petitioners had they disclosed that the deceased was in a polygamous marriage.*”

23. The Petitioner submitted that the said application was an afterthought having been filed over 26 years after the death of the deceased Danson Macharia, who died way back on 30th October, 1983. That the said undue delay should be discouraged by the court. That the petitioner complied with all the pre-requisite procedures which included advertisement in the Kenya gazette that if she was a beneficiary for her alleged husband’s estate she would take some sort of action from the time of his death in 1983. It was submitted that issues coming for determination are;

- i. Whether the proceedings to obtain the grant were defective in substance
- ii. Whether the grant was fraudulent by making of a false statement
- iii. Whether the grant was fraudulent by the concealment from court of something material to the case
- v. Whether there was untrue allegation of facts essential in point of law to justify the grant.

24. It was submitted that none of the issues can be determined in the objector’s favor. That the deceased held a meeting with the family and clarified that he had disagreed with the objector and sent her away which was tantamount to divorcing her and that he also ensured that he had separated her property holding with the rest by settling her family in a 3 acre farm plot no.1449 situated in Mutukanio Farmers Co. Ltd and he sought to confirm that the objector still owns the said parcel of land as per the letter from the Chairman of the Njoro Farm. Adding that at the time of his demise the deceased left an outstanding Settlement Fund Trustee loan on **Nyandarua/Malewa/192** and the same was paid off by Phyllis and her children. That the estate of the deceased would have been distributed by now had the co-administrator not died and that it was only after the demise of the co-administrator 8 years later that the objector sought to file the application seeking revocation of the said grant. He sought to attack Isaac’s testimony stating that he was untruthful and that he took sides with the objector. That none of the allegations in the application for revocation have been proved and as such he urges the court to dismiss the application for revocation and annulment of Grant.

25. It is a principle of law that he who alleges a fact must prove it; Section 107(2) of the Evidence Act provides; “*When a person is bound to prove the existence of any fact it is said that the burden of proof*

lies on that person.” From the evidence tendered before this court it is not in doubt that the objector was at some time married to the deceased. Though it is alleged that the deceased had divorced her no evidence has been adduced to support the same. Testimony by one Waithaka a son to the Phyllis in his evidence acknowledged the objector as his stepmother and stated that she and the father never separated as alleged and that she was also staying at the said disputed piece of land. From the foregoing it is clear that the petitioner has failed to prove that the objector was not a wife or had been divorced by the deceased.

26. From the evidence tendered it is clear that the deceased was in a polygamous marriage and as such Section 40 of the Law of Succession Act applies. Section 40 provides that, *“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”*

27. The Law of succession Act specifically Section 66 of the Law of succession Act, provides for preference on who to take out a grant in case of intestacy. The said provision provides that, *“when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of reference-*

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;”

28. From the foregoing it is not in dispute that the objector being a surviving spouse to the deceased ranks in priority to the petitioner who is a son in law to the deceased. Normal procedure requires the petitioner to have cited the objector and her children to accept or refuse to take a grant as provided for under rule 22 of the Probate and administration Rules which provides that, *“(1) A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.”* Instead the petitioner proceeded on with the succession proceedings as a sole administrator after the death of his co-administrator Phyllis.

29. The petitioner, by failing to disclose that there was another wife and children to the deceased and who were legitimate beneficiaries of the deceased’s estate could be said to have given false information and to have concealed material facts important and material to the case and this forms a basis for revocation of grant as provided for under section 76 of the Law of Succession Act, Cap 160 which provides that, *“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-*

(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;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;”

30. The evidence as adduced by the petitioner points to the fact that at the time that he filed the said petition for the grant his wife and the other children in the deceased’s family were minors and as such they lacked capacity to execute the said consent and as such the petition filed was defective in substance as it lacked consent.

31. In essence what forms assets of the deceased’s estate?

The petitioner had also alleged that the objector had been settled by the deceased in a 3 acre farm **Sipili/Ndonyoloip block 2/1449** situated in Mutukanio Farmers Co. Ltd. The only evidence adduced to support the allegation was a confirmation that the said parcel of land was registered in the names of the objector. No sufficient evidence was adduced by the petitioner to support that the same was purchased by the deceased. In this regard I find that the petitioner's claim cannot stand as such the said parcel of land does not form part of these proceedings and cannot be factored in distribution of the deceased's estate.

32. The petitioner alleged that Phyllis and her children had paid to the outstanding Settlement Fund Trustee loan on **Nyandarua/Malewa/192** to the exclusion of the objector this should be put into account.

33. The objector also argues that a parcel of land **Nakuru/Bahati/770** had been omitted in the lists of the deceased's property. The petitioner did not adduce any evidence to contravene the same.

34. From the foregoing it is clear that the petitioner concealed information that the deceased had another family and as such the said grant was obtained fraudulently by concealment of material to the case and this forms a basis for revocation of grant. Further, the said grant so issued was defective. This court therefore revoke's the said grant issued to the petitioner on **20th April 1994**. This court notes that this is an old matter and to avoid more delay directs that a fresh grant be issued to both the petitioner and objector as co-administrators to the deceased's estate. Parties to meet and agree on distribution of the said estate bearing in mind that the distribution of the said estate is governed by section 40 of the Law of succession Act.

Cost in the cause. It is so ordered.

Dated, signed and delivered this **18th** day of **August** 2016.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Petitioner**

.....**For the Respondent/Objector**

MS. Charity

Court Clerk