



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 302 OF 2009

IN THE MATTER OF THE ESTATE OF NJAMBI MUTURI alias NJAMBI w/o MUTURI
(DECEASED)

JUDGMENT

1. The cause herein relates to the estate of Njambi Muturi, who died on 15th September 2008.
2. Representation to her estate was sought in a petition lodged herein on 10th February 2009, by John Kamau Muturi, David Mbugua Muturi and Njuguna Muturi dated 10th February 2009, in their respective capacities as sons of the deceased. The deceased was expressed to have been survived by six (6) sons, namely John Kamau, Peter Njoroge, David Mbugua, Francis Ndungu, Njenga Muturi and Njuguna Muturi. He was expressed to have died possessed of four (4) assets, namely Dagoretti/Riruta/457, 1023, T. 94 and S. 69. A letter from the Chief of Kawangware Location was lodged simultaneously with the petition and it purports to confirm that the deceased was survived by the six individuals named in the petition.
3. A grant of letters of administration intestate was duly made on 12th May 2009. It was confirmed on 8th March 2010, the estate was to be shared amongst the six sons of the deceased.
4. On 9th December 2010, a summons was lodged in the cause, for revocation of the grant of 12th May 2009. The summons was taken out by Francis Ndungu Muturi, one of the sons of the deceased; on the grounds that there was fraud in the manner the grant was obtained for some of the heirs of the deceased were not disclosed. It was also alleged that the administrators had failed to account for their administration of the estate. Other than revocation, he sought orders in terms of declarations that certain individuals named in the application were survivors of the deceased who were entitled to a share in the estate, and orders for accounts to be rendered by the administrators and their agents.
5. In the affidavit in support of the application, sworn on 9th December 2010, the applicant stated that the deceased had daughters, who were not disclosed in the petition. He named them as Wanjiku and Watiri. Both are dead and were survived by children – Kamau Wanjiku, Njambi Wanjiku, Muturi Watiri and Kamau Watiri. These children were therefore grandchildren of the deceased. It is averred that the deceased used to live with them in the premises standing on Dagoretti/Riruta/S. 59, and, in addition, she used to cater for their upkeep. They are said to be still dependent on the estate's rental income. He protests that they were left out of the distribution placed before the court at the confirmation of the grant on 8th March 2010.
6. The applicant explains that all the four assets of the deceased are developed. According to him, on Dagoretti/Riruta/S. 59 stands a residential house where the deceased lived with her grandchildren. On Dagoretti/Riruta/1023 stands a rental house with 129 units, while Dagoretti/Riruta/457 has 128 rental units. The rent accruing from the said units is said to be collected by Peter Njoroge, David Mbugua, and

John Kamau. He adds that an estate agency, going by the name of Olive Joy Limited, collects rent from some 94 units. He concedes that he has constructed on Dagoretti/Riruta/T. 94, and that he collects rent from the units in that plot.

7. I have carefully gone through the record of the papers before me. I have not come across an affidavit of service with respect to the application dated 9th December 2010, although there is an affidavit of service sworn on 11th January 2011 in respect of a hearing scheduled for 25th January 2012. However, the hearing notice is unclear on what exactly was to be heard on that date.

8. From the minutes of the proceeding it is also not clear as to when the application became active before the Judges. What is clear is that there was an attendance at the court registry on 20th September 2011 when the application dated 9th December 2010 was given 17th October 2011 as the date for taking directions. Directions were taken on 17th October 2011, in absence of the respondents, that the application would be disposed of by way of *viva voce* evidence. There was an appearance on 25th January 2012 attended by counsel for the respondents, otherwise in most cases no one attended for the respondents.

9. The hearing commenced on 17th September 2013. Three witnesses testified for the applicant, and were led in evidence by Mrs. Kinyanjui, and cross-examined by Mr. Muhoro for the respondents. In the end the hearing of the application was closed without any testimony being recorded from the respondents.

10. The first witness on the stand was the applicant, Francis Ndung'u Muturi, who testified as PW1. He stated that the deceased had eight (8) children, being Kamau, Njoroge, Mbugua, Ndung'u, Njenga, Wanjiku, Njuguna and Watiri. He explained that he brought the revocation application because the families of the two daughters of the deceased, who are now dead, were left out of the distribution when the grant was confirmed. He said that Wanjiku had been survived by three children – Wambui, Kamau and Njambi – and Watiri had been survived by two children – Muturi and Kamau. He stated that both daughters were unmarried and lived with their mother on Dagoretti/Riruta/S. 59. They were both killed on 9th November 2005. Their children were left residing on the deceased's property under the care of Njambi Muturi and the applicant.

11. On the assets, PW1 stated that Dagoretti/Riruta/1023 measures about one (1) acre. There stands a house on it with fifty (5) units. He stated that it was Kamau Muturi who controlled the property. Dagoretti/Riruta/S. 59 was said to have one hundred (100) units, forty-six (46) of which were controlled by the deceased, while forty-five (45) of them were controlled by Njenga Muturi. Dagoretti/Riruta/457 was said to have one hundred and thirty one (131) units. The deceased had ninety six (96) units here, with Njoroge having fifteen (15) and Mbugua twenty (20) units. On Dagoretti/Riruta/T. 94 are fourteen (14) units. It is the applicant who lives her and controls the property. Dagoretti/Riruta/559 has three (3) units and on the property stands a three-bedroomed house. It was the deceased who was allegedly controlling the same.

12. He testified that Olive Joy Care, the estate grant, was collecting rents for some of the units, and the money realized was utilized to pay for electricity, food, salaries, garbage collection, school fees and on other expenses. The agent continues to date to collect the rents, but has stopped paying for the utilities, including school fees for the school-going children of the deceased's dead daughters.

13. The next on the witness stand was Lillian Wambui Wanjiku, a granddaughter of the deceased by her deceased daughter, Beatrice Wanjiku Muturi. She testified as PW2. She named her siblings as Peter Kamau Wanjiku and Stella Njambi Wanjiku. She testified that since birth she always lived on Dagoretti/Riruta/S. 59 with her late mother, her late aunt (Watiri) and her grandmother, the deceased herein. After her mother and her aunt were killed in 2005, she and her siblings and cousins continued to reside on the same property with their grandmother, who provided everything for them. When the grandmother died in 2008, they continued to reside at the same house. Their needs were initially being met from the rent collected by the estate agent. She complained that the grandchildren had been disinherited in the distribution and the house they lived in was put to sale by their uncles.

T14. the next witness was James Muturi Watiri. He testified as PW3. He testified that he was a grandson of the deceased from her daughter Watiri Muturi. He named his brother as Peter Kamau, and averred that they lived in their grandmother's house. His mother died in 2008, and he and his brother remained in their grandmother's house where the deceased provided all their needs.

15. It is not in dispute that the deceased died intestate. It is also not disputed that he had six (6) sons and two (2) daughters. The two daughters predeceased the deceased, but were survived by children, grandchildren of the deceased. It is also not disputed that when representation was sought in this cause the fact that the deceased had been survived by grandchildren, being the children of her daughters who had predeceased her, was not disclosed. That fact was concealed from the court. At the distribution of the estate, again the existence of the grandchildren was not disclosed, and the estate was distributed amongst the six (6) surviving sons of the deceased as if the grandchildren did not exist.

16. The law governing revocation of grants is section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. A grant of representation is liable to revocation on three broad grounds – where the process of obtaining it was marred by defects and irregularities, where there were difficulties with the administration process, and where the grant has become useless and inoperative due to certain circumstances.

17. The facts presented in support of the application for revocation of the grant in this cause bring the case within the first general ground. The applicant is saying that there were problems with the process of obtaining the grant. Under this general ground, are several sub-grounds – where the process of obtaining the grant was defective, where there was outright fraud and misrepresentation, and where the misrepresentation was innocent.

18. The facts as disclosed in the documents on record and the recorded evidence establish that the process of obtaining the grant was defective. The procedure for applying for a grant is set out in section 51 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules. Both provisions set out the requirements for such applications, in terms of the information that must be disclosed. For avoidance of doubt, I do hereby cite the relevant provision in section 51(2)(g) of the Act, it says –

'An application shall include information as to – in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.'

19. The grandchildren of the deceased, being the children of her children then deceased, were not disclosed at the point the grant was sought and obtained. There was therefore no compliance with section 51(2)(g) of the Act. The provision in section 51(2)(g) of the Act is reproduced in the Rules. Non-compliance with the mandatory statutory dictates appertaining to an application for a grant rendered the process defective, and exposed it to revocation.

20. The non-disclosure of the children of the deceased children of the deceased suggested that those grandchildren did not exist. Put differently, it meant that the deceased never had daughters, and if she did, the daughters did not have children of her own. The non-disclosure of the said grandchildren, whether it was done with a fraudulent intent or it happened inadvertently, amounted to misrepresentation of the true state of affairs and of concealment of important matter from the court. It is because of such things that grants of representation are revoked.

21. From the facts before me I must conclude, without any amount of hesitation, that the grant before me was obtained in a defective process and its procurement was driven by fraud, misrepresentation and concealment of important matter. It ought to be revoked.

22. Consequent upon the revocation, I will have to consider who merits appointment as administrators of the estate of the deceased. The applicant has done a gallant job in terms of standing up for the rights of his sisters' children. I have noted that some of the children of the deceased daughters of the deceased are majors and qualify in their own right to be administrators. I have noted too that the out-going administrators have been dishonest in the manner they went about obtaining the grant and distributing the

estate.

23. The question of accounts arose at the hearing, and some of the prayers in the application are on that point. The law is crystal clear on these matters. A person handling property that does not belong to him, and doing so on behalf of others, incurs the duty of having to account for his management and handling of such property. The assets herein have been generating income. By virtue of section 79 of the Law of Succession Act, the property of the deceased vests in the personal representatives. Such personal representatives therefore have a duty to account for the property that vested in them. The powers conferred upon them, include the power to appoint agents. Such agents are accountable to the administrators who in turn must account to court and to the survivors of the deceased.

24. The orders that I am persuaded to make in the circumstances are as follows:-

- a. That I hereby revoke the grant made on 12th May 2009 to John Kamau Muturi, David Mbugua Muturi and Njuguna Muturi;**
- b. That the orders made on 8th March 2010 confirming the said grant are hereby set aside, and the certificate of confirmation of grant issued subsequently on 13th April 2010 is hereby cancelled;**
- c. That all transactions carried out on the basis of the said certificate of confirmation of grant are hereby nullified;**
- d. That I hereby declare that Kamau Wanjiku, Njambi Wanjiku, Muturi Watiri and Kamau Watiri – being the children of the deceased children of the deceased – survivors of the deceased;**
- e. That a grant of letters of administration intestate shall issue to them accordingly;**
- f. That I appoint Francis Ndung'u Muturi, Peter Njoroge Muturi and Lillian Wambui Wanjiku administrators of the estate of the deceased;**
- g. That I hereby direct the new administrators, or any one of them, to apply for confirmation of the grant made to them by virtue of this judgment in an application where the grand-children named in (d) above are provided for, within thirty (30) days of this order;**
- h. That the outgoing administrators - that is to say John Kamau Muturi, David Mbugua Muturi and Njuguna Muturi – shall file and place before the court in the next thirty (30) days of this judgment a true and accurate account of their administration of the estate of the deceased from the date of their appointment on 12th May 2009 upto the date of this order;**
- i. That the said account shall include all the rent collected from the deceased income generating assets and how it was expended, and shall include the moneys collected by the agent known as Olive Joy Care;**
- j. That the matter shall be mentioned after thirty (30) days for compliance; and**
- k. That there shall be no order as to costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 23RD DAY OF SEPTEMBER, 2016.

W. MUSYOKA

JUDGE