



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2351 OF 2011

IN THE MATTER OF THE ESTATE OF NDUNG'U MWANIKI (DECEASED)

JUDGMENT

1. The deceased herein died on 2nd August 1974.
2. Representation was sought to his estate in a petition filed in Thika RMCSC No. 222 of 1986, by Joseph Mwaniki Ndung'u, in his purported capacity as a son and a purchaser. The deceased was expressed to have been survived only by the petitioner, and he was said to have died possessed of a property known as Ndarugu/Karatu/435.
3. A grant of letters of administration intestate was made in Thika RMCSC No. 222 of 1986 to the petitioner on 22nd June 1987. The grant was confirmed on 16th March 1989, and Ndarugu/Karatu/435 devolved absolutely upon the administrator.
4. The application dated 28th October 2011 was lodged in this registry by three individuals – Joseph Kamau Ndung'u, Jackson Mwaniki and Miriam Wanjiru. They all swore affidavits. The first two claimed to be sons of the deceased, while the other one was the widow of the deceased. They alleged that the administrator obtained the grant secretly without notifying them, after concealing their existence, after confirmation of the grant the administrator had the sole asset registered in his name and he was trying them evicted from the land.
5. There is a further affidavit by the first applicant sworn on 12th May 2014. He avers that the deceased had been survived by two (2) widows – Miriam Wanjiku and Nduta Ndung'u. The two women had nine (9) children between them. The children were Joseph Mwaniki, Mwangi Ndung'u, Rose Njeri Ndung'u, Antony Ngugi, Francis Mungai, Peter Muriu, Jackson Mwaniki, Veronica Njeri and John Kamau. Antony Ngugi and John Kamau have died and were survived by spouses and children. The deceased owned Ndarugu/Karatu/435 which he had not sold to anyone. The administrator was said to have petitioned for the grant in Thika RMCSC No. 222 of 1986 without involving the rest of the family.
6. The respondent administrator swore an affidavit on 8th August 2014 in response. He asserted that the applicants were aware of the proceedings in Thika RMCSC No. 222 of 1986. He alleged that the deceased had sold the property to someone, and he had to redeem the property from the buyer. The deceased thereafter agreed with him that the property would revert to the administrator. He named some individuals who he alleges were the witnesses to the sale, but claims that they have since died.
7. The first applicant swore a further affidavit to reply to the administrator's affidavit. He avers that the administrator has not provided proof of the alleged sale, wondering why, if there had been such sale, the deceased did not transfer the property to the administrator during his lifetime.

8. There is a further affidavit by the administrator to the effect that the deceased had sold the land to a certain Muchai, and he had to redeem it with money raised from his salary. There is also an affidavit by one Joseph Mbage, a cousin of the administrator and the first two applicants. He alleges that the administrator was working for his father at the time, and he was aware that the redemption was paid for with money deducted from the administrator's salary.

9. The matter was disposed of orally. Trial kicked off on 12th August 2014. The applicants were the first to take the witness stand. The second applicant, Jackson Mwaniki was the first witness. He testified that the deceased had been survived by two widows and several children. He said the family had moved in 1957 to the Rift Valley leaving the Ndarugu property. He asserted that the administrator was not the only person entitled to the property as he was not the only survivor of the deceased. He denied that the same had been bought by the administrator from the deceased.

10. The third applicant testified next. She said she was the first wife of the deceased, who also had a second wife. Both had children. She asserted that her husband had not sold his land to her son. She claimed that she and the children are in possession of the land.

11. The case for the respondent's opened on 24th February 2015. The administrator was the first on the stand. He started that the suit land was originally in the name of the deceased. Then he subdivided into two and sold it to Muchai and Muthee Nduta. The family then moved to the Rift Valley, leaving the administrator behind at his uncle's home where he was working. The uncle asked Muchai if he could refund to him the purchase price so that the land could revert to him. He asserted that it was actually his uncle who bought back the land. They thereafter went to the Chief's office with the deceased, who indicated that he did not intend to benefit the other family members. He was also said to have been unwilling to allow the administrator's uncle to refund the purchase price so that the property could revert to the administrator. After the deceased died, the administrator allegedly went to court over the land, and redeemed the land. He alleged that the property was registered in his name after his grant was confirmed; otherwise before then it was registered in his father's name and subsequently in the name of Muchai. He alleged that he refunded his uncle's money by working in his farm. He stated that the fact that the deceased was buried at Kitale was proof that the Ndarugu property was not his.

12. The respondent called his cousin, Joseph Mbage Ngugi, as his witness. He stated that he was twelve (12) years old when his father redeemed the property from Muchai for the administrator, and recouped his money from the administrator's salary as the latter was working for the witness's father.

13. At the close of the oral hearing, both sides filed their respective written submissions. The applicants also filed a list and bundle of authorities.

14. The application for determination is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The said provisions grants discretion to the court to revoke grants of representation on five general grounds set out therein. Only the first three are relevant for the purposes of this application. A grant will be revoked where the process of obtaining it was defective in substance, or the process was attended by fraud in the form of the making of false statements or concealment of information from the court, or the making of untrue allegations.

15. These first three grounds relate to the period when grant was made. For that reason, the provisions carrying the grounds must be read together with the provisions on applications for grants of representation. Section 51 of the Act and Rule 7 of the Probate and Administration Rules state the nature of information that must be disclosed. Where the deceased died intestate, there must be disclosure of all the spouses, children, parents and siblings who survived the deceased. These provisions are in mandatory terms.

16. It is plain that the deceased was survived by a spouse and children. In the petition for grant, the administrator only disclosed himself as survivor. He did not disclose the fact that his mother and siblings were alive. This means that there was no compliance with section 51(2) (g) and Rule 7(1) (e) (i). This disclosure is required even where not all the persons listed are entitled to a share in the estate.

17. The non-compliance with section 51(2) (g) and Rule 7(1)(e)(i) by the administrator meant that the process of obtaining the grant was defective, and that the administrator relied on a false statement, concealed information from the court and made untrue statements. That then brings the matter fully within the specifications of section 76 of the Law of Succession Act.

18. Was the administrator the sole owner of the property in question? I do not think so. The material presented is not convincing. There was no evidence that the land was ever sold to Muchai as alleged. The documents put in evidence allege that the administrator refunded the money to Muchai and the land was then to be given to him. The said document was not signed by the deceased nor the administrator, the persons who should have been at the centre of the transaction. The contents of the document contradict the oral testimony of the administrator. His case was that the refund was by his uncle, and the money was thereafter recovered from his salary. There is nothing about that in the document. The person he called to support his story was at the time a strapping lad of twelve years who could not possibly be privy to such transactions.

19. I am satisfied that a case has been made out for grant of the orders sought in the application dated 28th October 2011. The orders that I make in the end are as follows:-

(a) That grant of letters of administration intestate made in Thika RMCSC No. 222 of 1986 to the administrator herein on 22nd June 1987 is hereby revoked;

(b) That the orders made on 16th March 1989 confirming the said grant are hereby set aside, and the certificate of confirmation of grant extracted from the said orders dated 16th March 1989 is hereby annulled;

(c) That all or any transactions carried out on the strength of the said certificate of confirmation of grant are hereby nullified;

(d) That the court file in respect of Thika RMCSC No. 222 of 1986 shall be returned to the registry of the Thika Chief Magistrate's Court out of which shall issue a fresh grant in the names of the applicants herein - Joseph Kamau Ndung'u, Jackson Mwaniki and Miriam Wanjiru;

(e) That the administrators appointed under (d) above shall move with speed for confirmation of the grant to be issued to them under (d) above; and

(f) That the applicants shall have the costs of the application.

20. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF OCTOBER, 2016.

W. MUSYOKA

JUDGE