



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1946 OF 2002

IN THE MATTER OF THE ESTATE OF NG'ANG'A MWANGI alias SULEIMAN NG'ANG'A MWANGI (DECEASED)

JUDGMENT

1. The deceased herein died on 7th February 1985.
2. Representation was sought in this cause vide a petition lodged herein on 31st July 2002 by Rahab Wanjiru Ng'ang'a, Simon Githuku Ng'ang'a and Ruth Wanjiru Ng'ang'a, in their purported capacities as the widow and children of the deceased. The deceased was expressed to have been survived by the three petitioners, and to have died possessed of an asset known as Loc 2/Kangari/1000.
3. A grant of letters of administration intestate was accordingly made on 7th October 2002 to the three petitioners. The same was confirmed on 24th June 2003; vide an application for its confirmation dated 3rd June 2003. According to the certificate of confirmation of grant dated 24th June 2003, the only asset of the estate was to be held in trust by the widow for the benefit of the two children of the deceased. On 23rd July 2010, a summons for revocation of the grant herein was lodged at the registry herein by Hannah Wangui Gachango. Her application does not state the grounds for revocation of grant set out in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, but it would appear that she founded the same on the facts that the process of obtaining the grant was defective and the grant was obtained through fraud and misrepresentation. The said application was subsequently withdrawn on 7th November 2011.
4. Another summons for revocation of grant was filed herein on 3rd November 2011 by Hannah Wangui Gachango. The applicant's principal case appears to be that the land that was distributed on 24th June 2003 was family land. In her affidavit in support of the application, she has stated that the deceased was her brother in law, and the land in question ought to have been shared between her family and that of the deceased, for the deceased had held it in trust for himself and her late husband. She has averred that the said land was initially Loc 2/Kangari/450, which was registered in the name the father of her late husband and the deceased, one Gachango Kiarri. The deceased was said to have had it fraudulently transferred to his name, whereupon he sold two acres therefrom to a Peter Mwangi Kiburu without the consent of her side of the family, upon which it was subdivided into Loc 2/Kangari/999 and 1000. She has also averred that an award of the Land Disputes Tribunal in DLT No. 172 of 2004 which gave her half share of the original Loc 2/Kangari/450.
5. The applicant has attached several documents to the application to support her contention. There is copy of a certificate of death of her late husband, Josiah Gachango Mwangi. There is a copy of a letter signed by the Assistant Chief of Kangari Sub-Location which identifies her and the family of the deceased as the persons entitled to pursue representation in respect of the estate of the deceased. There are also proceedings of the Land Disputes Tribunal in case DLT 172 of 2004 where the applicant's side of the

family was allegedly awarded half of Loc 2/Kangari/1000. Finally, she has attached a copy of a green card in respect of Loc 2/Kangari/1000, which indicates that it was a partition from Loc 2/Kangari/450.

6. The administrator, hereinafter to be referred to as the respondent, swore an affidavit in reply to the application on 9th December 2011 and filed it herein on 14th December 2011. She averred that the deceased and the late husband of the applicant were born of the same mother by different fathers. That made them half-brothers, for the deceased was the son of the initial proprietor of Loc 2/Kangari/450, who died and then his widow married his brother with whom she begat the late husband of the applicant. The respondent's contention is that the applicant's husband was not a biological child of the deceased's father and therefore she and her children were not entitled to a share of property that the deceased had inherited from his biological father.

7. She avers further that that notwithstanding, the deceased had out of brotherly love sold a portion of his inheritance and gave the sale proceeds to the applicant's husband which the latter then utilized to acquire property in Londiani. The land, Kericho/Londiani/Block 2/Kamuingi, was allegedly acquired by the applicant's husband through the Kamuingi Farmers Company Limited, and it measured 2.508 hectares. The applicant's husband died before the property was transferred to him, but the same was eventually registered in the name of the applicant.

8. The deponent has attached several documents to her affidavit to support these contentions. There is a letter, which undated and alleged to be from Kamuingi Farmers Company Limited, indicating that the applicant's husband was the owner of Kericho/Londiani/Block 2/Kamuingi/152 which measured 2.505 hectares or thereabouts. There is also copy of a letter dated 24th April 1975 allegedly from the deceased to a person who had occupied Kericho/Londiani/Block 2/Kamuingi/152 after the applicant's husband's death without the applicant's consent. The deceased had written to the person asking him to quit the land. There is also a green card in respect of Kericho/Londiani/Block 2/Kamuingi/152 which indicates that a Anna Wanjiki Gachago had been registered as proprietor of Kericho/Londiani/Block 2/Kamuingi/152 on 7th August 2000.

9. The respondent has further averred that there never was a dispute between the deceased and his late half-brother over Loc 2/Kangari/450. She explains that the property changed to Loc 2/Kangari/1000 after a portion was hived off to raise funds to facilitate the filing of a suit number 94 of 1975 against the person who had trespassed on Kericho/Londiani/Block 2/Kamuingi/152. The said suit was successful and the property was registered eventually in the name of the applicant. She contends that the applicant had never raised the issue regarding Loc 2/Kangari/1000 in 1976 when it was registered in the name of the deceased, nor during the lifetime of the deceased prior to his death in 1985. She states that the applicant only began to raise issues after she was forced out of Londiani in 1992 as a result of the politically instigated tribal violence that occurred then. When that violence erupted, the applicant and her children moved into Loc 2/Kangari/1000 where they were offered one (1) acre to settle by the deceased's widow, which she accepted. She however began to demand more land. The matter was referred to the Chief where she was given an additional one (1) acre, but she declined. It was after that the matter was escalated to the tribunal. The tribunal awarded her half of the land, but the respondent appealed and the appeals committee held that the property was registered land, and advised the parties to move the court for succession for the matter to be resolved by the probate court. She has attached a copy of the decision of the Provincial Land Appeal Tribunal dated 30th April 2009, which is to that effect.

10. The applicant reacted to the averments in the respondent's affidavit by swearing on 31st January 2012 and filing it herein on 1st February 2012. She asserts that the respondent was not in apposition to talk about the paternity of the applicant's husband, stating that her husband and the deceased were blood brothers to the extent that they were born of the same mother. She further asserts that she is a beneficiary as she lived on the suit land and had been identified as such by the Chief. She further states that the portion hived off of Loc 2/Kangari/450 and sold allegedly to acquire Kericho/Londiani/Block 2/Kamuingi/152 was so sold in 1970 and 1975, yet her husband died in 1969. She asserts that her husband bought Kericho/Londiani/Block 2/Kamuingi/152 with funds from his savings but his family was evicted from the property in 1992, and was not planning to go back to that land.

11. Directions on the disposal of the application were given on 14th February 2012. The application was to be disposed of by way of oral evidence.

12. The hearing commenced on 11th March 2013. The first to take the witness stand was the applicant. Her evidence in chief largely reiterated what she had deposed in her affidavit in support of the application. On cross-examination, she stated that her deceased husband was the son of Gachango Kiarrii, who died a long time ago. She conceded that her late husband had not seen Gachango Kiarrii for the latter died before her husband was born. She said she did not know the family history that her mother in law had been inherited by her brother in law. She stated that when she got married in 1966 she resided at Londiani until 1992. She said that she had not resided at the suit land before then, but her late husband used to visit and tell her that she had land at Kangari. She conceded that after her death there was an attempt to evict her from the Londiani property, she filed a case at Kigumo and eventually won back the land. She testified that she raised the money to prosecute the case by selling maize. She alleged that her mother in law was heavy with child when Gachango Kiarrii died. She further stated that she commenced the tribunal case during the pendency of this succession cause, adding that she sold the Londiani property so as to finance the case.

13. The applicant's second witness, Peter Gachango Muhoro, described himself as a friend of the applicant's late husband. He stated that he and the applicant's husband used to burn charcoal and peel tree barks in 1964 – 1965. He said the applicant's late husband moved to Londiani in January 1966 and bought land there with proceeds of the sale of charcoal. The witness also alleged that he also bought land there with the money he had raised from selling charcoal and bark peelings. He testified that the applicant used to harvest tea leaves from the suit land that had been planted by her late husband before he moved to Londiani. She was also said to have planted her own tea shrubs on the suit land. On cross-examination, he could not tell when the deceased was born, nor when the applicant's late husband was born.

14. The respondent's case opened on 1st July 2013. The first to testify was Damaris Wanja Macharia. She claimed to be a sister in law of the deceased. She confirmed that the late husband of the respondent was a half-brother of the deceased as he was of a different father with the deceased. His father was said to be Mwangi who had inherited her mother after her husband died. The mother of the deceased apparently had only one child with her first husband, that child was the deceased. After Gachango Kiarrii died, the deceased's mother was inherited by her brother in law, Mwangi Kiarrii, and thereafter got three children with her, which children included the husband of the applicant. She stated that the family land at Kangari had been subdivided by the clan and everyone in the family got their share. On cross-examination, she stated that the applicant came into the Kangari land from Londiani after there were skirmishes there although she could not tell the date when that happened. .

15. The next on the witness stand was Joseph Maina Mwangi. He stated that he was a resident of Kangari and knew the parties to the dispute. He said he had called by the widow of the deceased when she wanted to give the applicant one (1) acre out of the suit property. The applicant agreed and that transaction was reduced into writing. The writing took the form of the document put in evidence dated 9th December 2011, which was said to be in the hand of the applicant's son. He explained the background to the transaction to be that following the tribal clashes at Londiani; the applicant had come back to Kangari and had been given land to settle. The transaction was intended to formalize that. The applicant appeared to have been satisfied, but the matter later escalated to the Chief's office, where the elders granted her two (2) acres. He stated that he was not aware whether the parties in the matter were related to each other.

16. John Gichane followed. He was a resident of Kangari too. He was one of the witnesses when the matter was before the Chief. He explained that the matter ended up at the Chief's office after the applicant was unhappy with the one (1) acre awarded to her by the deceased's widow. The applicant wanted more, but the deceased's widow declined, saying that she was giving land to the applicant free. She had been given the land out of sympathy for she was in distress after she was forced out of her property at Londiani following the tribal clashes. He stated that the applicant was not included as beneficiary as she had rejected the one (1) acre she had been given. He added that she was still on the land as orders had not been given for her eviction. .

17. Ruth Wanjiru testified next. She was the daughter of the deceased. She identified the applicant as the widow of her father's stepbrother. She explained that her father and her uncle shared a common mother but had different fathers. When her grandfather died, her grandmother was inherited by her granduncle, who went on to sire the applicant's husband. Her granduncle married another wife after her grandmother died. She explained that her great grandfather's property had been distributed between her grandfather and her granduncle. She also went into details of what happened during the Mau Mau and the legal skirmishes between her father and her uncle over the property, culminating in the purchase of the Londiani property. She explained that the Londiani property had been purchased prior to the applicant being married. The applicant was said to have been married in 1967 by the witness's uncle, who subsequently died in 1969. After his death, the applicant moved back to her parents' home and remained there until 1975 after the deceased had removed, through court action, a trespasser who had moved into the Londiani land. The trespasser was said to be another half-brother of the applicant's husband. The deceased was said to have sold a portion of his land to finance the litigation. The applicant remained in the land until 1992 when she was forced out by tribal clashes, and was accommodated by the deceased's wife and children.

18. At the conclusion of the oral hearing, the parties were directed to file written submissions. It would appear that only the respondent filed hers. She has largely summarized the submissions on record. She cited the provisions of the Limitation of Actions Act, Cap 22, Laws of Kenya, to argue that the claim by the applicant is statute-barred since twelve (12) years have passed since the deceased transferred the subject property to his name in 1976. It is also argued that the applicant has never been a dependant of the deceased within section 29 of the Law of Succession Act. It is also submitted that she was not a child of the deceased, and that her husband's property was in Londiani.

19. What is for determination is a straightforward application for revocation of a grant.

20. The law on revocation of grants of representation is notorious. It is set out in section 76 of the Law of Succession Act. That provision identifies five grounds upon which a grant may be revoked. The five can be collapsed into three (3) general grounds. The first ground relates to problems with the process of obtaining the grant, where there are defects in the process or fraud and misrepresentation are brought into play. The second ground relates to the process of administration. A grant will be revoked where the administrators fail to apply for confirmation of grant within the period allowed by the law or to account or to exercise diligence in the administration of the estate. The final general ground is where the grant has become useless or inoperative on account of subsequent circumstances.

21. It would appear to me that the application before me is founded on the first general ground, problems in the process of obtaining the grant. From the papers before me, I understand the applicant to be saying that the process of obtaining the grant was defective and was attended by fraud to the extent that she was not disclosed to have been a survivor of the deceased.

22. To answer the question whether there were problems with the manner the grant was obtained one has to go back to the provisions of the law governing the applications for and the making of grants of representation, to assess whether the processes set out there in had been complied with in order to determine whether there were defects in the process or exercise of fraud and misrepresentation. The process of applying for a grant is dealt with in section 51 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules. Section 51(1) states that the application takes such form as may be prescribed. The prescribed form is to be found in Rule 7. Section 51(2) sets out the information that ought to be disclosed in the application. For our purposes the relevant part is paragraph (g) thereof which states as follows:-

'(g) 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...'

23. The deceased herein is said to have died intestate. The information that ought to have been disclosed at the point of applying for the grant should have conformed with section 51(2)(g) of the Act. Did it so

conform? The petitioners stated that the deceased had been survived by a widow and two (2) children. From the material placed before me it would appear that the deceased was not the only child of his mother, he had brothers and sisters, albeit by a different or different fathers. These siblings were identified as Njeri, Wangari and the applicant's late husband. Section 51(2)(g) does not say whether the siblings ought to be full, or, put differently, it does not exclude half-siblings. The three ought to have been disclosed. The failure to disclose them amounts to a defect in the proceedings, and it can also be argued that there was fraud and misrepresentation, and even concealment of facts. That would bring the matter squarely within the first ground for revoking a grant.

24. The applicant has raised the issue of the deceased holding property in trust for her late husband. The respondent has argued that the issue is time barred and has cited certain provisions in the statute of limitation. The applicant has marshaled quite some evidence to support her case for a trust, while the respondent has countered by evidence to establish that there was no such trust. If I find that there was such a trust, I would be compelled to order the distribution of the estate as between the families of the deceased and that of the applicant's husband. I am however not moved to venture into making that determination given that as a probate court I cannot make determinations as whether a claim is statute-barred or not, nor decide questions of ownership of property. That jurisdiction properly lies with the Environment and Land Court.

25. The determination of such matters is not even proper in cases where the court is faced with an application for revocation of grants. The proper place for such is when determining applications for confirmation of grants. The proviso to section 71(2) of the Act requires that the court be satisfied as to the identities of the beneficiaries and of their shares, and in confirming the grant the court is required to specify all such persons and their respective shares in the grant. That would mean that the assets to be distributed ought to be ascertained. It is at this stage that it has to be established who is entitled to a share in an estate and the property that is available for distribution. It is equally at this stage that any trust is proved.

26. Rule 41 of the Probate and Administration Rules goes even further and requires that when an issue arises as to ownership of any asset placed before the court for distribution, such property ought to be set aside in terms of being taken away from the distribution table to await determination in separate proceedings. Such separate proceedings would be in a separate suit commenced under the Civil Procedure Act geared to determining such issues as ownership and existence of trusts. It would be in such suits that the issue as to whether the Limitation of Actions Act applies to the claim.

27. In view of everything that I have stated above, I am moved in the circumstances of this case to make the following orders:-

(a) That the grant made herein on 7th October 2002 to Rahab Wanjiru Ng'ang'a, Simon Githuku Ng'ang'a and Ruth Wanjiku Ng'ang'a is hereby revoked;

(b) That the orders made on 4th June 2003 confirming the said grant are hereby set aside and the certificate of confirmation of grant derived from the said orders is hereby cancelled;

(c) That any transactions conducted on the strength of the said certificate are hereby annulled and the property reverted to Loc 2/Kangari/1000 in the name of the deceased and the Land Registrar responsible for Murang'a County is hereby directed to give effect to this order;

(d) That the siblings of the deceased or their descendants shall be included in the schedule of the survivors of the deceased;

(e) That fresh administrators shall be appointed in an exercise that shall include the persons referred to in (d) above;

(f) That the distribution of Loc 2/Kangari/1000 shall be held in abeyance until the question as to whether the deceased held Loc 2/Kangari/1000 in trust for the late husband of the

applicant is determined in proceedings to be conducted before the Environment and Land Court;

(g) That Loc 2/Kangari/1000 shall be distributed only after a decree is passed by the Environment and Land Court with respect to the matters the subject of (f) above ;

(h) That as the estate comprises of assets situated at Kangari of Murang'a County, I shall order that this matter be transferred to the High Court of Kenya at Murang'a for disposal; and

(i) That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE