



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 106 OF 1991

IN THE MATTER OF THE ESTATE OF GACHARA GIKONYO (DECEASED)

JUDGMENT

1. The deceased herein died intestate on 29th July 1986. Representation to his estate was sought by Gikonyo Gachara, in his purported capacity as son of the deceased. The deceased was expressed to have been survived by four (4) children, that is to say Kamau Gachara, Francis Ndung'u Gachara, Patrick Ndung'u Gachara and Gikonyo Gachara. He was said to have died possessed of only one asset, being Ndarugu/Gathaita/453. A grant of letters of administration intestate was accordingly made to the petitioner on 16th April 1991. The said grant was confirmed on 14th July 2009; vide an application for confirmation of grant dated 1st December 2008. A certificate of confirmation of grant dated 14th July was duly issued. The only asset distributed was Ndarugu/Gathaita/453 amongst Gikonyo Gachara, Kamau Gachara, Francis Ndung'u Gachara and Patrick Ndung'u Gachara.

2. On 1st July 2011, a summons of even date was lodged at the registry in the cause, for revocation of the grant made on 16th April 1991. The grounds upon which the application is based are set out in the affidavit in support sworn by the applicant, Esther Njambi Mburu, on 29th June 2011. She avers to be a daughter-in-law of the deceased, by virtue of having been married to a son of the deceased, the late Mburu Gachara, who predeceased the deceased on 5th March 1984. She states that shortly following her husband's death, her brothers in law, including the administrator herein, demolished her dwelling house and chased her out of Ndarugu/Gathaita/453 together with her children, without any just cause. She claims that she has stayed out of the subject property ever since.

3. Her case is that when the administrator moved to court for letters of administration in this cause, he did not inform her, nor include her name, or those of her children, among the persons entitled to a share in the estate. She further avers that the record does not have a letter from the Chief or Assistant Chief of their area of residence. She asserts that the administrator lied to court when he alleged that the deceased was survived by only four (4) individuals. She mentions that she had filed a land case with the Land Dispute Tribunal for Gatundu, in Land Case No. 20 of 2008, against her brother-in-law, which she alleges was resolved in her favour. She has attached a number of documents to her affidavit to support her case. There is a certificate of death, serial number 192127, dated 27th November 2008, in relation to Mburu Gachara indicating that the latter died on 5th March 1984. There is copy of a letter from the Chief of Rwabura Location, Gatundu, dated 13th June 2011 stating that the applicant had been married to the late Mburu Gachara, they had eight (8) children together, before they separated.

4. The application was served on the respondents, as there is an affidavit of service on record, sworn on 24th October 2011, and filed herein on 7th November 2011. There is also a notice of appointment of advocate by the administrator dated 1st October 2012, filed herein on 7th December 2012. It would appear from the material before me that the administrator did reply to the application, but his replying affidavit

does not appear to have reached the court file.

5. The applicant reacted to that replying affidavit, by swearing a further affidavit on 20th April 2012 and filing it in court on 24th April 2012. She concedes, in it, that she had not been staying together with her husband for quite sometime during the period when he and the deceased died, but she asserts that all that while her children lived with their father at the matrimonial home, and even remained there after his death. She avers that the children only left the matrimonial home after the deceased's death following the demolition of their house by the administrator and his brothers. She states that she had been in good terms with her father in law, who had assured her that her late husband's property was still available for her and her children. She claims that she and her children even attended the funeral of the deceased. She explains that the deceased had prior to his death shared out his property amongst his wives, and given his other wife, other than the mother in law of the applicant, the land at Ithanga, and therefore that other house should have no claim to Ndarugu/Gathaite/453. She asserts that the administrators are only trying to bring the other family in so as to lock her out together with her children. She concedes that her late husband had married another woman after she left, but states that that woman too was ill-treated by the administrator and his brothers, who assaulted her and evicted her from the property.

6. Directions on the disposal of the application were even on 25th June 2012, that it would be disposed of by way of oral evidence.

7. The hearing commenced on 21st May 2014. The applicant was the first to take the stand. She stated that she was married by the deceased's son in a year she could not recall, and she pleaded illiteracy. She was allegedly married a virgin, under customary law and dowry was paid. She claimed to have borne the deceased eight (8) children, who were all named in accordance with Kikuyu customs. She and her husband were shown a portion of the deceased's land to till, and so were the other four sons of the deceased. She explained that she was separated from her husband as at the date of his death. She could not recall the year of death. She went back to her parents with the younger children, while the older ones were left with her husband. She however used to visit her husband, and attend family functions. Efforts to reconcile were made, they would reconcile and she would come back, but her husband was a drunkard and there would be problems thereafter as a consequence. He married another woman after she left. When her husband died she attended the funeral and stayed for a while with the family but without moving back to her husband's house. It was her case that she had talked to her deceased father in law before his demise concerning her late husband's share of the land, and she was assured that eventhough she was staying away from the family, the land was still available for her and her children. The deceased was said to have died shortly after that whereupon her late husband's house was demolished. She stated that she was not informed of nor involved in the process of obtaining representation to the estate. She stated that the deceased had a second wife who lived at Ithanga on another property belonging to the deceased. The second family was settled there for it could not co-exist with the respondents.

8. The applicant's second witness was David Mwaura Gachara, a paternal nephew of the deceased. He identified the applicant as a widow of one of the sons of the deceased called Mburu, with whom they had eight children. They were allegedly married under Kikuyu customary law, and their children named in accordance with Kikuyu customs. He stated that the deceased had, during his lifetime, subdivided his land amongst his five children, and each one of them built on the portion allotted to them, and cultivated on it. He stated that the couple disagreed often on account of the applicant's husband's drinking and they ended up separating, but did not divorce. After the applicant left, her husband allegedly married another woman, who was chased away with the children, after their house had been demolished by the administrator and his brothers. He mentioned that the applicant had filed a land case at the Land Disputes Tribunal, which awarded her a share of the land. He concluded by saying that the deceased had another wife who was resident at Ithanga.

9. The next witness for the applicant was Mungai Gachara. He testified to be a relative of the deceased, and a personal friend of the deceased. He said that he knew that the applicant was married to the deceased's son called Mburu, with whom she had eight children. They were allegedly married under Kikuyu customary law, and never divorced. The witness alleged to have been party to the negotiations that led up to the marriage. He stated that as at the time of the applicant's husband's death, the pair had

separated and he had married another wife, but he had remained with the children. He stated that the deceased had subdivided his farm into five portions, and each son had been given their portion. He testified that following the deceased's death, the administrator and his brothers demolished the applicant's husband's home and chased away the children together with the other wife. He mentioned that he was aware of the tribunal matter where the applicant was awarded a portion of the land.

10. John Kabuu Ngotho followed. He was a paternal nephew of the deceased. He stated that he knew that the applicant had been married by the deceased's son called Mburu. He claimed to have been party to the marriage ceremonies that preceded the marriage. He also mentioned that he was aware that the deceased had subdivided his land and shown each of the sons their respective portions.

11. The administrator took the witness stand on 15th July 2015. He asserted that he was unaware of the alleged marriage between his brother Mburu and the applicant, stating that as at the time of his death, Mburu did not have a wife. He said that Mburu had been living with a woman who left after Mburu died. He could not remember her name, although he mentioned that she had just gotten together with him before he died. He stated that the deceased had subdivided his land into five portions after Mburu died. The land was shared amongst the four remaining sons of the first wife and one son of the second wife. The son of the second wife subsequently sold his share to the administrator and thereafter bought land at Ithanga. Another portion of the land had also been given to the deceased's second wife, which she also sold to him. He stated that they had a sale agreement drawn up by a lawyer but he did not have the papers in court. He said that the deceased had no land at Ithanga, and therefore he could not have given that parcel of land to the second house. He asserted that the second house bought the Ithanga property after selling to him their share of the Rwabura property. He said that Mburu had not been shown a place to build and farm by the deceased; nor had he constructed a house and had grown coffee. He stated that he thought that Mburu had married the applicant, but they did not have a house, adding that they were probably living in their mother's house, although he insisted that he did not know. He stated further that he did not know the number of children that Mburu had with the applicant. He later said that the two were in fact married but separated around 1961. He conceded that the two had lived together for some time, but said that no customary law rites were ever performed, as the applicant came and left. He conceded the tribunal case and the award, but asserted that he did not lose the case; saying that they had been told whoever was aggrieved by the award could appeal. He asserted that he had followed all the right procedures in applying for the grant, although he did not file a letter from the Chief.

12. The next to testify for the administrator was Miriam Wanjiku Gachara, the second wife of the deceased. She stated that the first wife had five (5) sons and two daughters. She stated that on her part she had seven (7) children. She asserted that she did not know the applicant, and had never seen her. She further asserted that the first wife did not have a son called Mburu, saying that her second son was called Ndung'u instead. She said that the deceased subdivided his land and shared it out amongst his sons, including her own son. She also got a share. She said that she sold her share and bought land at Ithanga; however her son did not sell his portion and still lived on the land given to him by his father. She later said that he died, but before then he had joined her at Ithanga, and when he died she shared out his Rwabura property amongst his brothers. She asserted that her husband never bought the Ithanga property, saying that she was the one who had actually bought it. She said she bought it after getting married. The purchase money, she said, was raised by her from the menial jobs she was doing at the time. She said that her son got land at a place called Karing'a, which he then gave to his stepbrothers.

13. At the conclusion of the oral hearing, the parties were directed to file their respective submissions. They complied with the said directions, and filed their submissions, which I have read through and noted the arguments made therein.

14. The principal issue for determination in these proceedings is whether the grant herein was obtained properly. I have to evaluate overall whether the administrator followed the laid down procedure for applying for a grant of letters of administration in intestacy. I will also need to ascertain from the evidence whether the applicant was a survivor of the deceased.

15. The applicant's case is that she was a daughter in law of the deceased, being a widow of one his sons.

By dint of that fact she and her children were survivors of the deceased, entitled to a share in the estate of the deceased. Consequently, they ought to have been involved in the process leading up to the making of the grant, and those contentions, they ought to have been listed as survivors. She led evidence to support those contentions calling two of the relatives of the deceased, who attested to the fact that she was a daughter in law of the deceased, she had had children with the deceased, she had difficulties in her marriage but never divorced. On his part, the administrator initially denied the applicant, saying that he was not aware that she had been married to the deceased's son, Mburu. Then he shifted ground and said that he thought that they were married, and that they had no house and suggested that they probably lived in his mother's house. Then again he stated that they were married but separated in 1961. He called his stepmother as a witness, who asserted that the deceased did not have a son called Mburu and that she did not know the applicant.

16. The evidence presented by the applicant and her witnesses is fairly consistent on all aspects – regarding the fact that there was a marriage, some rites were performed, the couple had children, the couple separated but there was no divorce, among others. The evidence adduced by the administrator and his witness, is, on the other hand, suspect. Initially, the administrator denied being aware of any marriage between his brother and the applicant. He then shifted gears and said that he just thought, as opposed to knowing, that the two were married. Later he stated as a matter of fact that they were married but separated after that. His witness fared even worse. Whereas the blood brother of Mburu asserted that his mother had a son called Mburu, the stepmother on her part asserted that no such person existed. Similarly, whereas the administrator acknowledged that his brother had married the applicant, his stepmother asserted that she did not know of the applicant. In my view that cannot be. It means that the stepmother's evidence lacks credence, for she appears to deny facts that have been agreed amongst all the other witnesses.

17. I am satisfied from the facts placed before me by the parties that the applicant had been married to the deceased's son, which marriage subsisted up to the date of the said son's death.

18. The next question would be whether the fact of that marriage made the applicant a survivor of the deceased. The question of survivorship is bound to arise in all cases of intestacy. The deceased died after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. His estate therefore fell for distribution according to the provisions of that Act. Intestate distribution is provided for in Part V of the Act. According to the provisions in Part V, the persons who fall in the category of survivors who should have a beneficial interest in intestacy include, surviving spouses, surviving children, surviving parents, surviving siblings and half-siblings, and, lastly, other surviving relatives of the deceased up to the sixth degree of consanguinity. Priority goes to the surviving spouse, followed by the children. The estate ought to devolve exclusively upon the persons in the first category in the first place, the next category being entitled only when there are no survivors in the first or previous category. That is the effect of sections 35, 36, 38, 39 and 40 of the Act.

19. A close reading of the provisions will reveal that the survivors of the deceased are usually his or her blood relatives. The only non-blood relative entitled is the surviving spouse. That is the only key exception, but adopted children could also be put in the same class with the surviving spouse. That would mean that other persons who are related to the deceased by marriage would not qualify to be survivors of the deceased for the purpose of Part V of the Act. Daughters in law are not related to their parents in law by blood, but by marriage. They are therefore not recognized as survivors of the deceased for the purposes of Part V of the Act. The provisions of Part V of the Act do, however, cater for the grandchildren of the deceased, by dint of being the children of any deceased children of the deceased. They are entitled to take the share that would have otherwise devolved upon their dead parent through a principle called representation or substitution. They get to share their dead parents entitlement amongst themselves equally. That is the purport of section 41 of the Law of Succession Act.

20. Did the deceased have grandchildren by his late son, the late Mburu, and the applicant? The applicant asserted that she had eight children with Mburu. Her witnesses, who are also paternal cousins of her late husband and nephews of the deceased, corroborated that testimony. The administrator, on his part, stated that he did not know his brother's children with the applicant. In my view, that testimony was false, for

how could he possibly not know the children of the brother who follows him, after conceding that that brother was indeed married to the applicant. I note that he did not say that the applicant did not have children with the late Mburu. I will therefore hold that the applicant did have children with the late Mburu, who should be the grandchildren of the deceased, and who therefore must be taken to have survived the deceased, entitled to take the share of their dead father, the late Mburu.

21. Having established that the applicant had been married to a child of the deceased, and having found that her children were survivors of the deceased, the matter that I ought to consider next is whether the correct procedure was followed in obtaining the grant the subject of these proceedings. This is necessitated by the provisions of section 76 of the Law of Succession Act under which the application before me is premised.

22. Revocation of grants is provided for under section 76 of the Act. The court will revoke a grant where there are problems with the process of obtaining it, where there are issues with the administration of the estate and where the grant has become useless and inoperative. The applicant appears to have grounded her application on the allegation that there were problems with the process of obtaining the grant. In such cases it is envisaged that the proceedings to obtain the grant were defective in substance, or where the grant was obtained in a fraudulent manner by concealment of matter from court, or where it was obtained by means of misrepresentations.

23. What ought to be contained in an application for representation is set out in section 51(2) of the Law of Succession Act. As the deceased died intestate, paragraph (g) thereof is critical. It provides as follows:

‘(2) An application shall include information as to - ... (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased...’

24. The language of section 51(2) (g) mandates any person applying for a grant of letters of administration intestate to disclose to the court the children of any child of the deceased who are then themselves deceased. These would be the surviving grandchildren of the deceased whose own parents were dead. The administrator herein was obliged to disclose the children of the late Mburu. He did not disclose these grandchildren. Indeed, he is also did not disclose his sisters or their children. He should have also disclosed the surviving spouse of the deceased, that is to say his stepmother and her surviving children and any child of any child of hers who was then deceased. Section 51(2) (g) is about appointment of administrators. The persons to be listed are those who may be beneficially interested. At this stage the court is not interested in distribution of the estate, and it would therefore not matter whether the survivors are entitled to a share of the estate or not. The law merely requires that at that stage all the members of the immediate family of the deceased be disclosed whether or not they were to get a share in the estate. The issue of whether or not they should be allotted a share in the estate ought to come up at the stage of the confirmation of the grant.

25. I find that a large number of survivors of the deceased were not disclosed. Non-disclosure of such a large number of survivors amounted to a major defect in the proceedings. It also amounted to fraud, for the names of those persons were concealed or suppressed creating an impression that the persons did not exist. The result then was that at distribution such persons were left out, or lost the opportunity to state their case at the confirmation of the grant. It also meant that there was misrepresentation of facts to the court.

26. I am satisfied from the facts of this case that the process of obtaining the grant herein was not proper, and violated the process set out by the law and placed a good number of survivors of the deceased at a disadvantage. The grant made to the administrator ought to be revoked in the circumstances. In the end I do hereby allow the application dated 1st July 2011 in the following terms:

(a) That the grant of letters of administration intestate made on 16th April 1991 to Gikonyo Gachara is hereby revoked;

(b) That the orders made on 14th July 2009 confirming the said grant are hereby set aside, and the certificate of confirmation of grant issued on 14th July 2009 on the strength of those orders is hereby cancelled;

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

(d) That the parties hereto shall apply afresh, in this cause, for representation to the estate herein in a process that shall include and involve the children of the applicant and members of the second house of the deceased;

(e) That the new administrators shall move with due dispatch and apply for confirmation of their grant given that the deceased died in 1991;

(f) That the deceased hailed from Gatundu and the estate is said to comprise of only one asset, being Ndarugu/Gathaita/453, which is situated within Kiambu County, consequently the cause herein shall be transferred to the High Court of Kenya at Kiambu for disposal; and

(g) That the applicant shall have costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF DECEMBER, 2016.

W. MUSYOKA

JUDGE