



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 1865 OF 2011
IN THE MATTER OF THE ESTATE OF JOHN KIREHU KARIITHI (DECEASED)
JUDGMENT

1. The deceased herein died on 16th May 1997. Representation to his estate was sought by Daniel Kirehu Murai in his purported capacity as grandson of the deceased. The deceased was expressed to have been survived by a widow and four (4) children, that is to say Naomi Wanjiku Kirehu, Sammy Maina Kirehu, Eunice Gathoni Kirehu, Jacob Gachanja Kirehu and Lucy Njeri Kirehu. He died possessed of only one asset, being LR No. 413/20 Longonot. A grant of letters of administration intestate was accordingly made to the petitioner on 13th February 2012. The said grant is yet to be confirmed.

2. On 27th April 2012, a summons dated 27th April 2012, was lodged at the registry in the cause, for revocation of the grant made on 13th February 2012. It also sought orders relating to preservation of LR No. 413/20 Longonot pending the hearing and determination of the application. The grounds upon which the application is based are set out on the face of the application, as well as in the two affidavits in support sworn by the applicant, Sammy Maina Kirehu, and his advocate, John Kiarie Njuguna. It is alleged that the grant was obtained fraudulently on the basis of concealment of facts and misrepresentation, as well as on grounds that the proceedings leading up to the grant were defective.

3. Sammy Maina Kirehu avers that he and others are the legitimate survivors of the deceased, and dismisses the administrator as an impostor. He accuses him of having started the exercise of accessing the deceased's property when the deceased was alive. He is said to have filed a suit in Naivasha PMCCC No. 58 of 2008 against the deceased with respect to LR No. 413/20 Longonot. He was also said to have had brought HCSC No. 361 of 2004 in his mother's estate where he alleged that LR No. 413/20 Longonot formed part of the estate of his deceased mother and where he actually got that property confirmed in his favour. He complains that the administrator did not inform them when he sought representation in this cause. He states that the administrator had assaulted the deceased and his wife, and had threatened to kill the applicant and his siblings. He also avers that his mother's house was burned down by arsonists led by the administrator, who subsequently disappeared.

4. The documents attached to the applicant's affidavit include an order made in Naivasha PMCCC No. 58 of 2008, a letter from the administrator withdrawing the suit in Naivasha PMCCC No. 58 of 2008, a certificate of confirmation of grant in HCSC No. 361 of 2004, applications for transfer of LR No. 413/20 Longonot and a mutation form, and various court papers in HCSC No. 361 of 2004 where the administrator was seeking court assistance to facilitate transfer of the said property to his name.

5. On his part, John Kiarie Njuguna, the advocate, avers that the file herein disappeared shortly after he had filed an appointment, and was thus prevented from lodging objections to the grant being made to the

administrator. He accuses registry staff of colluding with the administrator in that regard.

6. The applicant filed another affidavit on 26th September 2014, which gives a breakdown of the deceased's family. The deceased is said to have been married to Naomi Wanjiku Kirehu. The deceased died in 2009, and his wife followed in 2013. As at the date of his death, the deceased was survived by two sons and two daughters, namely Jacob Gachanja, Sammy Maina (the applicant), Eunice Gathoni and Lucy Njeri. He had been predeceased by Mary Muthoni (the administrator's mother), Esther Wairimu, Joyce Waringi and Martha Nyambura. The deceased daughters of the deceased herein were survived by children, who are accordingly the surviving grandchildren of the deceased. Mary Muthoni was survived by Daniel Kirehu and Nancy Wahu, while Esther Wairimu was survived by Erick Kariuki Thuo and Judy Wanjiku, and Martha Nyambura was survived by John Kirehu, Njeri and Wanjiku. He also mentions that there is also John Kirehu Joyce, a son of Joyce Waringi. He argues that the administrator herein ranked lower than the living sons and daughters of the deceased. He also states that the administrator did not disclose the other grandchildren of the deceased, that is to say Nancy Wahu, Judy Wanjiku, John Kirehu, Naomi Wanjiku and Esther Njeri. There are affidavits on record by the other survivors which make averments similar to those of the applicant.

7. The respondent replied to the application through an affidavit sworn on 11th May 2012. He deposes that he is a grandson of the deceased by the former's first born daughter, Mary Muthoni Kirehu, who is since deceased. He states that his mother was not married. He details the troubles that he, his mother and siblings went through as they moved from one abode to another until they settled on LR No. 413/20 Longonot in 1978, where his mother put up a timber structure. They were allegedly evicted from there by the applicant and his mother. He deposes that when one of his sisters died in 1988, she was buried on LR No. 413/20 Longonot. He alleges that in 1995, the deceased, in the presence of another, gave the administrator's mother two (2) acres out of LR No. 413/20 Longonot. That arrangement was allegedly altered in 2002. He states that his mother, Mary Muthoni, died in 2002.

8. The administrator has filed several other affidavits thereafter, which largely repeat the averments made in the affidavit of 11th May 2012. I will, however, recite the contents of his affidavit sworn on 14th October 2014, which responds to the affidavits filed by the applicant and his witnesses in 2014. He asserts that his aunts, Eunice Gathoni and Martha Nyambura, were married, and therefore they, and their children, were not entitled to a share in the estate of the deceased.

9. Directions on the disposal of the application were given on 1st April 2014, that it would be disposed of by affidavit and oral evidence.

10. The oral hearings commenced on 4th February 2015. The applicant was the first to take the stand. His testimony largely gave vent to the affidavits that he had filed in the cause. I may just add that he said that before his father died he had subdivided his property, LR No. 413/20 Longonot, amongst the two sons. The property was said to be eight (8) acres and he had given each of the sons two (2) acres. The balance of four (4) acres was to be left for the daughters. The applicant's second witness was John Kiarie Njuguna, the advocate who had filed the application on the instructions of the applicant. His testimony breathed life to the averments made in his affidavit in support of the application. He detailed the frustrations he went through as he sought to trace the court file so as to file objections to the administrator's petition.

11. The respondent administrator did not testify, but he called one witness, Amon Muthee Kamau. He stated that he had been called by the deceased to his home on 5th September 1996, where the deceased allocated land to his daughters. He was instructed to write letters giving the daughters the land. He said the administrator's mother was given two (2) acres.

12. At the conclusion of the oral hearing, I directed the parties 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, especially in the authorities cited by the applicant.

13. It is common ground that the petition that initiated the matter herein was by the administrator. He is a grandson of the deceased. At the time he sought representation, the deceased's widow was still alive, and so was the deceased's two (2) sons and two (2) daughters. That fact emerges clearly from the petitioner's list of survivors.

14. The deceased died after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. His estate comprises of an asset situated within Naivasha Sub-County of Nakuru County, and therefore away from the counties that were exempted from the provisions of Act by section 32 of the Act. Consequently, his estate falls for administration and distribution in accordance with the provisions of the Law of Succession Act. From what has been placed before me, it is not disputed that he died intestate for it is not claimed by any of the parties that he had left a will, whether oral or written. The administrator herein sought and obtained representation in intestacy. The said estate is therefore subject to Part V of the Act, which governs intestate succession.

15. Section 66 of the Act sets out the persons ought to be granted representation in the event of intestacy. It gives an order of preference to certain persons. The said provision states as follows:-

'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; and

d. Creditors.'

16. Going by the above provision, surviving spouses are given first priority when it comes to representation. They are followed by the children of the deceased. The other relatives come thereafter. The deceased herein had been survived by a spouse. She had prior right to administration over the administrator herein, who is a grandchild of the deceased. He was survived by sons and daughters. These too had priority over the administrator herein.

17. Rules 21 and 22 of the Probate and Administration Rules provide for issuance of citations by persons who are entitled to representation in the event of the person cited renouncing his right. It would appear in this cause that citations did issue and were served on the widow and children of the deceased. I have not seen copies of the citations, but there is a notice of appearance to citation dated 22nd September 2011. The applicant however complains that he was not able to act on the citation for the file disappeared until after expiry of the period allowed by Rule 22(5) of the Probate and Administration Rules and the grant was made to the administrator in default of a response to the citees. It was in respect of this aspect that the advocate handling the matter swore the affidavit in support of the application herein and also testified at the oral hearing.

18. 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...'

19. It is not disputed that the deceased was survived by the persons that are set out in paragraph 6 herein. The administrator in his petition disclosed the widow of the deceased and the surviving children, but left

out all the surviving children of the dead children of the deceased save for himself. 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 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 Mary Muthoni, Esther Wairimu, Joyce Waringi and Martha Nyambura. These four women are said to have been survived by several children, who include Nancy Wahu, Judy Wanjiku, John Kirehu, Erick Kariuki, Naomi Wanjiku and Esther Njeri.

20. In his defense, the administrator asserts that he excluded them because their mothers had been married and were settled elsewhere. That argument does not hold. 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.

21. Revocation of grants is provided for under section 76 of the Law of Succession Act. The court will revoke a grant where there are problems with the process of obtaining it. It envisages cases where the proceedings to obtain the grant are defective in substance, or where the grant is obtained in a fraudulent manner by concealment of matter from court, or where it is obtained by means of misrepresentations.

22. In this case a large number of survivors of the deceased were not disclosed. Non-disclosure of such a large number of survivors amounts to a defect in the proceedings which goes to the heart of the matter. It also amounts to fraud, for their names were concealed or suppressed, creating an impression that the persons do not exist. The result would be that at distribution they would lose out on the share due to them. Or, put differently they would be denied an opportunity to argue their case in the event, at distribution, it is said they are not entitled to a share for whatever reason. It also means that there is misrepresentation of the facts to the court.

23. 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.

24. In the end I do hereby allow the application dated 27th April 2012 in the following terms:

- a. That the grant of letters of administration intestate made on 13th February 2012 to Daniel Kirehu Murai is hereby revoked;**
- b. That given the circumstances of the case, I do hereby appoint the surviving children of the deceased, that is to say Sammy Maina Kirehu, Eunice Gathoni Kirehu, Jacob Gachanja Kirehu and Lucy Njeri Kirehu, as administrators of the estate;**
- c. That a grant of letters of administration intestate shall issue to them accordingly;**
- d. That the new administrators shall move with due dispatch and apply for confirmation of their grant given that the deceased died in 1997;**
- e. That the deceased hailed from Longonot and the estate comprises of only one asset, being LR No. 413/20 Longonot, which is situated in the Naivasha Sub-County of Nakuru County, consequently the cause herein shall be transferred to the High Court of Kenya at Naivasha for disposal; and**
- f. That the applicant shall have costs of the application.**

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

W. MUSYOKA

JUDGE