



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 696 OF 2009

IN THE MATTER OF THE ESTATE OF MUNGAI NJUGUNA MAINGI (DECEASED)

JORAM MUNGAI.....1ST PETITIONER/RESPONDENT

BENSON NJUGUNA GAKINDIRU.....2ND PETITIONER/RESPONDENT

VERSUS

JAMES KANGETHE MUNGAI.....OBJECTOR/APPLICANT

RULING

1. By summons dated the 7th January 2013 and filed on the 9th January 2013, the Applicant James Kangethe Mungai sought orders of the court to revoke and annul the grant of Letters of Administration Intestate for the estate of Mungai Njuguna Maingi, deceased, issued to Joram Mungai and Benson Njuguna Gakindiru on the 20th September 2009 and confirmed on the 25th September, 2011.

He also sought an order to stay operation of the grant and conservatory orders to preserve the estate, and specifically prevent dealings with Parcel No. Nyandarua/Olaragwai/2632 pending hearing and determination of the application.

2. On the 21st January, 2013 this court issued orders and stayed operation of the Letters of Administration and conservatory orders to preserve the estate, and in particular the parcel of land above mentioned, and barred the Respondents from evicting the Applicants and the deceased's widow and children from the land parcel pending hearing of this application.

The application is opposed and the Respondents filed their replying affidavit on the 13th February, 2013. Parties thereafter agreed to file written submissions to dispose of the application.

3. The Applicant's case and submissions

In his supporting affidavit to the protest application, James Kangethe Mungai stated that the deceased his father was survived by a widow one Sarah Wairimu Mungai and 17 children and dependents, and he is one of the four sons. He had five daughters all married and six nieces and nephews, and that two other persons were beneficial owners of plots they bought from the deceased. That the Petitioners were and are not children of the deceased but nephews being children of the deceased's sister one Dorcas Muthoni Gakinduri, also deceased.

He further deposes that all the sons and their families except the married sisters live in the deceased's land parcel Nyandarua/Olaragwai 1/2632 which is the only asset left behind by the deceased.

4. It is contended that the Petitioners concealed the above material facts when applying for the letters of administration, and misrepresented to the court, secretly and without consent of the widow and children that the deceased was unmarried and had no children hence were the only beneficiaries. To buttress their contention, the Petitioners had coerced the Area Chief by letter from their Advocates who forced him to issue a letter to the Petitioners despite his objection that the applicants/petitioners did not hail from his location, yet the D.O. had instructed him to issue such letter of identification of the deceased to his widow, Sarah Wairimu Mungai.

In his submissions, Advocate for the Applicant submitted that the deceased was survived by a widow (94 years) and children and that the Petitioner having been nephews of the deceased, can not rank in priority to the widow and children, and further that the application from the letters of administration were obtained secretly, applicants were not invited or cited to apply, was fraudulently obtained and that the only recourse is to revoke the said grant as it was made to disinherit the rightful beneficiaries.

5. In furtherance to the fraud, it is submitted that pursuant to the confirmation of grant, the Petitioners moved and registered the land parcel above referred to into their joint names and in equal shares, and a Title Deed issued to them on the 30th November, 2012 as certified from an official search certificate attached to the supporting affidavit. It is further submitted that the rightful beneficiaries are now being threatened with eviction from the land and one being referred to as squatters by the Petitioners, and the buyers of portions of the land parcel too have not been spared.

6. In view of the above, the Applicant, on behalf of the widow and the other children of the deceased, pray that the grant and the certificate of confirmation of grant be annulled and the land parcel Nyandarua/Olaragwai/2632 be reconveyed back to the estate.

7. **The Petitioners/Respondents case and submissions**

In opposing the application, the Petitioners in their replying affidavit state that the deceased never married, had no children, and that the applicants list of children and dependents were children of a 3rd party named Jesse Mungai Kiarie, and hence, had no superior right over them being the deceased nephews. They further state that the Applicants and all listed beneficiaries are squatters in the deceased's land. They too claim that the applicants have misrepresented material facts to the court to get the grant revoked.

8. In their written submissions the Petitioners/Respondents through their Advocates Hari Gakinya & Co. Advocates, it is submitted that the Applicants are not related to the deceased and have never been dependents and that the deceased closest relatives were the Petitioners, and that they were not obliged to invite or cite the Applicants to apply for the grant. They state that there was no non-disclosure of crucial material and no fraud was committed. They pray for dismissal of the objection/application with costs.

This court has considered the supporting affidavit and replying affidavit to the application and submissions by both counsel, including legal arguments advanced by the both counsel.

9. The grounds upon which the application is based is concealment of crucial information by the Petitioners that lead to fraudulent dealings in obtaining the grant and subsequent transfer of the deceased land parcel into the names of the two Petitioners who, and it is not in dispute, her nephews to the deceased.

The issues this court ought to determine, in my view are:-

(1) whether the Petitioners/Administrators were the only beneficiaries to the estate of the deceased.

- (2) whether the Applicants are beneficiaries to the estate of the deceased.
- (3) whether the grant of letters of administration and the certificate of confirmation of grant were obtained fraudulently by concealment of crucial information from the court.
- (4) whether orders sought ought to be granted.

The court will deal with them collectively, as they are all interrelated.

10. It has not been disputed that the Petitioners/Respondents are nephews of the deceased herein. From the records, it has also come out clearly that there is a dispute as to whether or not the deceased ever got married and left behind a wife and 17 children and dependents. The Applicants contend that their mother, Sarah Wairimu Mungai was wife to the deceased and with whom were borne four sons and five daughters. This is evident from the fact that the Area Chief was not keen to issue a letter of identification to the Respondents to facilitate application for the grant, and that the chief too had to be coerced into issuing a letter to the said Sarah Wairimu Mungai as widow to the deceased.

11. Section 66 of the Law of Succession Act and 2nd schedule, table of consanguinity of the Probate and Administration Rules Chapter 160 Laws of Kenya gives the order of preference in the application for letters of Administration in the following order -

- (1) Surviving spouse, with or without other beneficiaries.
- (2) Other beneficiaries entitled in intestacy.
- (3) The other group that can be considered are public trustee and creditors. The table shows the following order – children, grandchildren, brothers and sisters, nephews and nieces ...

The widow, with other beneficiaries that could be the children if any ordinarily takes precedence. Other beneficiaries, in this case, brothers, nephews, nieces come after the widow and children, and grandchildren. In this matter, the Petitioners are nephews. The Applicant represents the widow and children of the deceased. If indeed the deceased had children with the said widow Sarah Wairimu Mungai, then the logical conclusion, and as submitted, they ought to have been invited and/or cited to apply for the grant, and their consent, if they denounced their right to apply as provided for under rule 18(1) of the Probate and Administration rules sought to have been given under their hand.

12. Section 7(e) of the Probate and Administration rules requires that all survivors of a deceased ought to be disclosed. In the case **Re Estate of Philip Kiprono Bett (deceased) (2005) eKLR** - it was held that consent of all adult survivors for both the grant of administration as well as the confirmation and mode of distribution ought to be given. None disclosure of all beneficiaries is therefore a defect that goes to the root of the administration cause.

13. Justice Koome in **Ngatia -vs- Ngatia (2008) KLR** pronounced herself that if crucial information is placed before the court that the deceased was married to the applicants mother with whom they had children the court would have requested the Petitioner that citations be served upon the applicants.

14. The Petitioners/Respondents hereof failed to disclose that very crucial information to the court of the existence of a wife and children. Though they deny such existence, it is clear from the affidavit of the widow Sarah Wairimu Mungai filed on the 23rd September, 2013 that indeed she was the wife of the deceased with whom she had eleven children and other dependents and that the issue of the letter by the Area Chief was a very contested one, as the Area D.O. had to intervene for her to be given one as the widow of the deceased.

15. It was her statement that the Applicants were never dependents of the deceased, and that she and her children lived with the deceased on land parcel for over 60 years, where they called home. It is curious that the Respondents deponed that the alleged Applicants as widow and children of the deceased were

children of one Jesse Mungai Kiarie. No attempt even by affidavit was this aspect followed up. As such it remains an allegation, subject to prove.

16. After confirmation of the grant of Letters of Administration, the Petitioners/Administrators moved and caused a transfer of the deceased land parcel where the widow and children and other beneficiaries to be transferred into their joint names as confirmed by an official search. Thereafter the original title was closed and other sub-titles issued. These are shown as Nyandarua/Olaragwai/870, 871, 872, 60. This confirms the assertion that the Respondents are now out to evict the deceased's family whom they term as squatters from their homeland hence the preservative orders issued by this court at the commencement of this application.

17. I have looked at the application for confirmation of the grant filed in this court on the 19th January, 2011 and the further supporting affidavit of the mode of distribution of the estate. The only property left and referred to above was to be distributed equally to the alleged 5 beneficiaries, the two administrators as nephews and three nieces.

18. I have noted that later the administrators sought to rectify the grant vide their application dated 15th November 2011 where they excluded the nieces thus leaving the two of them to share that culminated in the certificate of confirmation of grant issued on the 25th March 2011 to hold the said land parcel between the two in equal shares, and the eventual issuance of the Title Deed in their joint names on the 30th November 2012, to the total exclusion of the Applicants family.

19. **Findings and conclusion**

Having analysed the above and having considered all the relevant legal provisions, I now proceed to make my final findings on the matter as a whole pursuant to powers donated to me by the provisions of Section 73 of the Probate and Administration rules that empower the court to make any order in the interest of justice.

(1) The court finds that the Petitioners and Respondents in this matter being the nephews of the deceased rank far below in order of preference in the application and or person entitled to apply for letters of administration as provided under Section 66 of the Law of Succession Act, and schedule 2 of the said Act. As to whether the Petitioners-Respondents were the only beneficiaries to the deceased's estate, I find that the deceased was survived by a widow, one Sarah Wairimu Mungai and seven children including the Petitioner and other beneficiaries and dependents. They were therefore not the only beneficiaries.

(2) The court finds that the Petitioners while applying for the Letters of Administration concealed very crucial information to the court that the deceased had no family and that they were the only beneficiaries. It follows therefore that the proceedings to obtain the grant was fraudulent and defective.

The said Letters of Administration and the Certificate of Confirmation of grant issued by the court on the 25th March 2011 is hereby revoked and annulled.

(3) It is further ordered that pending fresh application for letters of administration for the estate of the late Mungai Njuguna Maingi deceased, by the rightful heirs and beneficiaries, the only property of the estate being Nyandarua/Olaragwai/2632 be reconveyed back to the Estate, and all sub-divisions from the said original title be cancelled.

(4) That a conservatory order is hereby issued to preserve the estate of the deceased and specifically, the Respondents are restrained and barred from evicting the Applicant, the widow and family and other beneficiaries from the said property Nyandarua/Olaragwai/2632 pending the application and grant of letters of administration to the rightful heirs and beneficiaries.

(5) That there shall be no orders as to costs as this is a family matter.

Dated, signed and delivered at Nakuru this 14th day of May 2015

JANET MULWA

JUDGE

In the presence of:

Ms. Njeri Advocate - for the 1st Petitioner and holding brief for Mr. Ikua for the 2nd Petitioner and

Mr. Njuguna - for the objector