



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 384 OF 1984

POLLY NYAMBURA KAHUNGU.....APPLICANT

VERSUS

LOISE NYAMBURA NGUGI..... RESPONDENT

JUDGMENT

1. The deceased to whom these proceedings relate died on 28th June 1981. Grant of letters of administration was granted to Geoffrey Ngungi Kahungu on 27th June 1984 and confirmed on 24th January 1985. The affidavit in support of the application for confirmation it stated that he was the only son surviving the deceased and entitled to 100% of the deceased's estate. The applicant via the application dated 26th March 2012 seeks revocation and annulment of the confirmed grant issued on 24th January 1985.

2. The application is grounded on grounds that the confirmed and temporary grant was obtained fraudulently and by non-disclosure of material facts. That the said administrator now deceased lied that he was the only child of the deceased. That the applicant is a daughter of the deceased and has lived on parcel of land known as **Dagoretti/Uthiru/504** since birth to-date though the said property has been subdivided pursuant to the said grant and the respondent a widow to her deceased brother has threatened to evict her and dispose off the property.

3. In her affidavit in support, she reiterated the grounds on the face of the application adding that she has 4 children though she has never been married and denies any knowledge of the proceedings of this cause since the death of her father and that her mother died a few years later. She states that her late brother fraudulently obtained a grant by making false statement that he was the only child surviving his father. That he used the false declaration to subdivide the said property **Dagoretti/Uthiru/504** whilst registering some in his name **Dagoretti/Uthiru/1053** and selling others. That her late brother died in 2008 and the widow believed that the property belonged to her late husband and intends to dispose of it.

4. The respondent in her replying affidavit dated 19th April 2012. She denied being a party to the proceedings in Succession Cause no. 384 of 1984 adding that the applicant lacked locus standi to seek any orders against her in this matter. Further that the applicant's claim for land had been defeated by statute of limitation adding that she had not been formally enjoined as a party in the matter. She added that the said grant like all other succession causes matters was gazette inviting all those who had objections and as such the applicant's ignorance of law was not a defence.

5. The cause proceeded for hearing on 20/1/2015. In her testimony, the applicant reiterated facts as deposed in her affidavit. She added that her late father had money in the bank from his pension and other properties in Uthiru village which her late brother sold and never shared the sale proceeds and urged the

court to subdivide the shamba in half so that she gets her share. She stated that She had asked her brother to give her share but he refused and that resulted to her coming to court.

6. In cross-examination she testified that after her father died she was staying in his house and when her brother refused to divide the shamba she went to the chief and he ordered that she moves out which she did. That she moved to another shamba owned by her father where her brother showed her where to build but her portion of the land was not agreed on. At the time she decided not to bring her brother to court as he was unwell.

7. PW2, Nancy Njeri Kuria is a cousin to the applicant. She testified that she has stayed in Uthiru since 1963 whilst her auntie stayed at her father's place. She adduced into evidence a photograph of Rehab, Ngungi and Nyambura. She added that after the applicant's father's death her late brother asked her to move and he sold the plot. That her brother later gave her a plot where she built and where she lives to-date.

8. In cross-examination she confirmed that the applicant moved when her brother asked her to do so and she went to live in a place called cooperation and thereafter the brother sold the plot back at the village. That the applicant was given a wooden rental house where she stayed with her children. That later the applicant was given a place to build by her brother where she lives to date.

9. PW3 was Miriam Mumbi Nyoike she testified that she knew the applicant who was a daughter to her late auntie Rahab. That her auntie had 2 children Geoffrey Ngugi and Polly. That Polly still lives in her father's shamba, that her uncle on her death bed told her to look after her daughter and that no dowry was to be taken as her dowry.

10. In cross-examination she admitted that the applicant has built in the upper portion of the land. That she had something written down but it got burnt when fire burnt her house and that the place the applicant stays was to belong to her eldest son whom she named after her father.

11. DW1, Francis Ngugi Karugi a cousin to the late Geoffrey Ngugi testified that he asked him to tell his sister to move. That the late Geoffrey held a meeting to discuss the said portion of land. Nyambura on her part asked for more time to be allowed to move and he gave her a plot since she was his sister. That he was introduced to Peter Njogu who said he was Nyambura's husband and they even asked him when he would bring dowry. That when she moved she substantially developed the plot, built a storey building.

12. On cross examination he affirmed that Nyambura was Ngugi's blood sister and that the two were the only children of the late Kahugu Kimamo. He denied attending any marriage negotiations relating to the applicant adding that his testimony only touched on the meeting held by the applicant's late brother. He added that the late Kimamo had old school of thought that dint give their daughters land.

13. Loise Nyambura Ngugi the wife to the late Geoffrey Ngugi testified that her late husband become the registered owner of the land held by his late father way back. She testified that the applicant had two daughters and two sons and was married to one Peter Njogu. She added that she had once seen an affidavit where the late Kahugu Kimamo had indicated that he only wished to leave his land to his only son after completing paying his loan and sought to have the said affidavit admitted into evidence.

14. On cross examination she testified that her husband had agreed with Polly to give her something and the two went to the chief and signed something. That where the applicant moved had permanent buildings adding that she moved there when it was developed and did not make any attempts to develop it further. She urged the court to allow her transfer the said parcel of land in her husband's name and the applicant can be a beneficiary.

15. She testified that where Polly was shown is fenced though she did not know the acreage her portion was bigger than the applicant's. She testified that the husband upon retirement took a loan and started a butchery business. She stated that her husband sold plot no. 483 but could not recall what they did with the money. She denied knowing of money in the bank.

16. The applicant in her submissions gives a summary of the evidence adduced and further argues that Section 76 of the Law of Succession, Cap 160 provides that, “*An application for Revocation of Grant whether the grant has been confirmed or not can be made at any time*”. As such she submits there is no time limitation to file an application for revocation of grant on this she relied on the case in the matter of Samuel Gachingiri Wanjau, Deceased (2013) where it was held that, “*there is no limited time set within which grants whether confirmed or not or whether distributed or not can be revoked.*” That Rule 44 of the probate and administration Rules on the other hand provides that, “*any person interested in the Estate of the deceased may apply for the revocation in the court where the Grant was made*”. She added that being a daughter of the deceased a fact admitted by the respondent the respondent was entitled to do so. That the evidence led by both sides indicates that the applicant and her mother were left out when the petitioner petitioned the court for the grant of administration relating to the deceased’s estate and did not seek their consent. That having died intestate the rules of intestacy were to apply in the distribution of the deceased’s estate. That the applicant had discharged her burden of proof that the said grant was obtained by misrepresentation and non-disclosure of material and relevant facts to the court and as such should be revoked. She relied on the case of **James Gathoga Ndungu & Another –vs- Mary Wanjiku Gathoga (2005) eKlr**, where the court in granting the respondent’s application and revoking the grant of letters of administration that had been confirmed observed that the respondent, who failed to reveal that the applicants were the children of the deceased, should have been candid and transparent to the court to enable it make an informed and reasonable decision after being alerted to all the relevant facts.

17. The respondent in her submissions submitted that the current application by the applicant is a claim for land under the guise of revocation for grant. An action she claims is already time barred having been filed more than 12 years after the respondent’s husband acquired the land and informs the court that the applicant had a pending matter in **ELC No. 221 of 2011 Polly Nyambura Kahugu –vs- Loise Nyambura Ngugi**. She added that the applicant was married to one Peter Njogu and had 4 children and also that her father had expressed that all his land goes to his son and had sworn an affidavit to that effect.

18. That the deceased died on 27th June 1981 before the Succession Law Cap. 160 came into force on 1st July 1981 and as such the applicable law is customary law. In this regard, the respondent relied on the case of **Kamuki Mweithi High Court Succession No. 2325 of 1999**, where it was held that Kikuyu Customary Law would apply in respect of an estate of the deceased person who died before the enactment of Cap 160. In the Restatement of African Law Vol. 2 by Eugene Cotran at page 8 the learned author has given an opinion that; *inheritance under Kikuyu Customary law is patrilineal. The pattern of inheritance is based equally distribution of a man’s property among his sons, subject to the eldest son may get slightly larger share, daughters are normally excluded but may also receive a share if they remain unmarried.*”

That in **Civil Appeal No. 76 of 1998 Mary Wanja Gichuru –vs- Esther Watu Gachuhi**, it was held that, “*It is a matter of notoriety amongst the Kikuyus that an unmarried daughter who becomes a mother must inform her father of the name of the father of the child so that her father would take necessary steps to preserve the rights of his daughter and her son. It is unthinkable that an unmarried daughter remaining in her father’s house would give birth to five children. This only goes to show that Esther must have been married and it is settled law that under the Kikuyu custom land is inherited by sons. It is a patrilineal society.*”

19. That the Law of succession Act at Section 1 provides that, “*this Act may be cited as the Law of Succession Act and shall come into operation on 1st July, 1981*” and the same as per section 2(1) was “*to apply to all cases of Intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.*”

The Act further in section 2(2) provides that, “*the estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.*” [emphasis mine]

20. The deceased to whom this succession cause relates died on 28th June 1981 this was just before the

Law of Succession Act came into place. Further it is not in dispute that the applicant herein was a sister to Geoffrey Ngugi Kahungu and a daughter to the deceased and has been living in her father's compound until her late brother Geoffrey opted to give her an alternative plot where she has been residing to-date. Though the respondent alleges that she got married no evidence was adduced to support the same. The respondent in her submissions cited various cases and restatement of customary law and text written many years ago that Kikuyu Customary law is patrilineal and women are not supposed to inherit.

21. The application of customary law is qualified by Section 3(2) of the Judicature Act which provides that, *“The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”*

In the case of **Otieno v Ougo & Another, 2008 1 KLR 9 & F page 948**, it was observed: - *“The place of customary law as the personal law is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary and common law in a matter of personal law? First of all, if there is a clear customary law on this kind of a matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality and were thus discarded, there would be the common law to fall back upon, at least in a modified form. In this way, these two great bodies of law for that is what they truly are, complement each other. They may be different but the way to operate them is to use them as complimentary to each other without conflict as laid down in Section 3 of the Judicature Act (Cap 8)”*.

Justice Koome, **In Re The Estate of Mugo Wandia (Deceased) [2009] eKLR** stated as follows, *“I find the submissions that the applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the Judicature Act. Besides the Judicature Act there is the Constitution of the Republic of Kenya. Under section 82 of the Constitution discrimination of the basis of sex is prohibited. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable. It would also go against the reasonable expectation by the applicant that when she comes to a court of law she will be afforded equal treatment and access to justice. Kenya amongst other countries under the United Nations is party to several human rights conventions and treaty which prohibit discrimination against women. Key among them is the Universal Declaration of Human Rights especially Article 1 and the Convention on all forms of discrimination against women (CEWDA). It is for those reasons that at this day and age when the Government has made a lot of efforts to eradicate poverty and embrace equitable policies and programmes of development a court of law cannot pronounce a judgment that goes against that spirit. The applicant is entitled to a share of her deceased father's estate even if he died in 1976 and his property was distributed in the year 2004.”*

The Court of Appeal in the case of **Erastus Gichingiri Muhoro v Gerishon Gichingiri Muhoro & 2 others [2014] eKLR**, held that *“The repealed Constitution of Kenya also outlawed discrimination and although we may not refer to the Constitution of Kenya 2010, which came into operation later, the principle of non-discrimination is further emphasized. The principle is now a non-derogable right otherwise known as Jus cogens.”*

22. I find that Customary Law should not be repugnant to justice and morality or inconsistent with any written law. The applicant has proved she is a daughter of the deceased. Her late brother had given her a portion of land on which she has settled to-date. I find that in the interest of justice that the applicant should be entitled to inherit land surviving the deceased specifically **Dagoretti/Uthiru/504** where she has lived since birth to-date.

From the foregoing the grant obtained and confirmed were obtained fraudulently and by non-disclosure of

material facts and is revoked. The applicant and the respondent are hereby appointed as the administrators' of the estate of the deceased's estate now that Geoffrey Ngugi is deceased. The late Geoffrey Ngugi Kahungu having obtained and confirmed the grant to the deceased's estate has since transferred the said parcel of land into his names. The title to parcel no. **Dagoretti/Uthiru/504** transferred into the names of the late Geoffrey Ngugi Kahungu be canceled and reverted to the deceased's name. The applicant and respondent to share the said parcel of land equally. Each party to bear its own costs. It is so ordered.

Dated, signed and delivered this **11th** day of **December** 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Applicant** .
.....**For the Respondent**
.....**Court Clerk**