



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 342 OF 2005

IN THE MATTER OF THE ESTATE OF PATRICK MWANGI WATHIGA-DECEASED

JUDGEMENT

Patrick Mwangi Wathiga (herein after referred to as the deceased) died intestate in 5th day of April 2005. On 29th June 2005 this cause was filed by **Jane Wanjiku Mwangi** and **Fredrick Wathiga** in their capacity as wife and son of the deceased. They listed the following persons as beneficiary entitled to the deceased's estate, namely;

- i. *Jane Wanjiku Mwangi- Wife.*
- ii. *Isaac Wahome-Son*
- iii. *Fredrick Wathiga-Son*
- iv. *Margaret Watetu-Daughter*
- v. *Loise Mumbi-Daughter*

The letter from the chief had one more name, namely Miriam Njoki who does not appear in the above list. The only property listed in the affidavit in support of the said petition is **Muhito/Mbiuni/186**.

The Petition was gazetted on 16th September 2005 and on 30th September 2005, James **Wathiga Mwangi** filed an objection to the making of the grant claiming to be a son of the deceased's first wife and that himself and his brother were not included in the letters of administration.

On 15.2.06, Okwengu J directed that a temporary Grant of letters of administration be issued in the joint names of the Petitioner and objector. By way of an application dated 25th August 2006, the said **James Wathiga Mwangi** applied for the grant to be confirmed. There was no appearance either by the Petitioner herein or any of the beneficiaries and the application was allowed. There is nothing on record to show that the Petitioner or the beneficiaries ever consented to the said confirmation or mode of distribution. At the hearing hereof the Petitioner denied ever having been served with the said application or any court papers. On 24th May 2007, Makhandia J allowed the said application after the applicant informed him that the mode of distribution had been agreed upon and that the Petitioner had been served.

On 1. 10. 2007, the objector filed a notice of motion seeking orders that an officer of this court signs the necessary documents to facilitate sub-division and transfer of **Muhito/Mbiuni/186** claiming that on several occasions he had presented the transfer documents to the Petitioner but she declined to sign. No documents were attached to show that the said documents were ever presented to her and the affidavit of service just like the previous ones stated that the Petitioner declined to sign. The said orders were granted on 18.2.2008.

Apparently the applicant attempted to register documents at the lands office pursuant to the above cited order, and the Land Registrar as expected asked for details of the Petitioner. Un able to secure them and in view of the clandestine manner in which the process was being undertaken, the safest was to obtain a

court order, an act which as I will mention later in this judgement was a misuse and abuse of the court process. On 17.9.2009, the objector filed another application seeking orders that the court compels the District Land Registrar, Nyeri to comply with the Court order issued on 15th July 2008. Unfortunately for the objector and fortunately for the Petitioner herein, the Objector framed the said application as "Summons for Rectification of Grant" and Justice Makhandia dismissed the said application on 24.11.2009.

The objector was back again in court this time by an application filed on 30.11.2009, seeking orders to compel the District Land Registrar, Nyeri to comply with Court orders referred to earlier in this judgement and proceed to issue titles as per the grant of letters of administration. There was an affidavit of service stating that the application had been served, but the petitioner declined to sign the papers. The court allowed the application.

It is important at this stage to mention that at the hearing of this case, the Petitioner denied that she was ever served with court papers in all the above mentioned applications.

On 25th May 2015, **Jane Wanjiku Mwangi**, the Petitioner herein applied to this court for orders *inter alia* that the Grant issued in this case be revoked and that the Land Registrar be restricted from registering any entries in respect of Title Numbers **Muhito/Mbiuni/186** stating that she was the lawful wife of the deceased, that she initiated the process of petitioning for grant in this cause but fell ill and thereafter the objector proceeded with the petition without her participation and that the grant was confirmed without her participation, that the objector failed to notify the court that she was sick and that the distribution was not acceptable and did not reflect that the deceased had other children. Attached to the affidavit in support of the said application are documents confirming that the deceased had actually divorced the objectors mother and they had agreed she changes her identity card and delete the deceased's name and that neither side was to claim anything from each other.

On 23.6.2015 the parties appeared before Ngaah J and directions were granted that the case said application shall be determined by oral evidence. The matter came up before me on 25.11.2015 in the presence of the objector and the Petitioner and I directed that the application proceeds before me on 27.11.2015.

At the hearing, **Jane Wanjiku Mwangi**, the Petitioner, testified that the deceased was her husband, she produced a copy of her marriage certificate and maintained that she was the only wife of the deceased, that by the time she married the deceased in church he had already divorced his first wife, that she had five children with the deceased whom she had named in the petition. She stated that the deceased owned title number **Muhito/Mbiuni/186** and that's where they lived with her children. She was categorical that to her knowledge, the deceased never had other children and that she lived with the deceased as husband and wife for 24 years. During the said period, they lived on the said land and no other person came to claim land from them or claimed to be a son to the deceased.

She insisted that the petitioner only emerged after this Petition was gazetted, that soon after filing this petition, she fell sick, and was bed ridden for 4 years and did not follow up the process. She only learnt later after discovering that someone had purchased a portion of her land from the objector, that she was not aware that the grant had been confirmed and she never attended court. She also confirmed that she was still holding the mother title and that the said land had never been subdivided.

She stated that a search reveals that the land was jointly owned by her and the objector, yet she still held the original title and does not know how that happened, that her proposal is that herself and her children should inherit the land as they are entitled.

On cross-examination by the objector, she insisted that she found her late husband and her mother living on the said land, and that she did not know the objector.

James Wathiga Mwangi, the objector herein testified that he lives at Nyahururu, that the deceased was his father, that he was born in 1975, and brought up by his father, that he left to look for employment, that

he used to visit his father in hospital, that he attended his father's funeral, and that in 1987 he came to know about this petition. He testified that he had two other brothers but did not explain to the court their whereabouts' and whether they had any interest in the deceased's estate or why they had no interest. He insisted he applied for the grant but the Petitioner refused to cooperate and that she never signed any papers, that he did not know whether she signed the land transfer documents.

The issues for determination are:-

- i. Whether the deceased died intestate.*
- ii. Whether the grant obtained by the objector ought to be nullified and if so why?.*
- iii. Whether the objector is entitled to the a portion of the title number **Muhito/Mbiuni/186**.*

With regard to issue number one based on the evidence adduced, I find no difficulty in concluding that the deceased died intestate.

On the issue whether the grant obtained by the objector can be allowed to stand, it's important to recall that the Petitioner testified that after filing this Petition, she got sick and was unable to follow up the process, that she much later learnt that the a third party had bought a portion of her land and upon checking the court file, she discovered that the objector had obtained a grant. She insisted that she was never served with any papers. Curiously, in all the affidavits of service filed by the objector regarding the various applications the objector filed, it was alleged that she refused to sign. Given the nature of this dispute and what is at stake and having observed the parties as they gave evidence in court, I am persuaded that there is no way the Petitioner could have been served and fail to attend court. This raises doubt as to the truthfulness of the said affidavits of service and reflects badly on the motive of the objector.

The objector filed an application seeking orders that an officer of this court signs sub-division and land transfer documents alleging the Petitioner had declined to sign and never attached any document to show the efforts he had made to secure her signature. The court allowed the said application on the strength of the said affidavit of service, and when the land Registrar insisted of being furnished with particulars of the beneficiaries to registrar the transfer documents, the objector came back to court and applied for orders that the registrar be compelled to accept the said transfer documents. Again, there was no evidence that the Petitioner was asked to furnish any documents or appear before the land registrar. Again, on the strength of the affidavit of service which alleged that the Petitioner refused to sign the court papers, the court allowed the application and using the said grant the objector was able to have the title registered in the joint names of himself and the Petitioner. The Petitioner testified that she is still holding the original title and at no time was she ever asked to surrender it nor has she ever appeared at the lands office with the objector.

As observed above, having observed both parties testify before me, I am persuaded that the Petitioner was kept in the dark and never knew that the objector had obtained the grant and that she only woke up after she learnt that the objector had sold or purported to sale a portion of the land.

The above scenario raises serious questions as to whether the objector misused the court process to obtain the grant targeting the said land and if so whether the grant can be allowed to stand. Section 76 of the Law of Succession Act^[1] provides as follows:-

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all the above grounds.

As mentioned above, this is a clear case where it is evident the objector misused court process by misleading the court that he had served the Petitioner and secured several court orders on the strength of misleading the court that there was proper service. To me, this amounts to misuse of court process and gross abuse of the judicial processes. In *Agnes Muthoni Nyanjui & 2 Others Vs Annah Nyambura Kioi & 3 Others*^[2] this court held that:-

*"The concept of abuse of court/judicial process involves circumstances and situations of infinite variety and conditions. It has one common feature which is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of judicial process may lie in both a proper or improper use of the process in litigation. Note the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the imitation and annoyance of his opponent and the efficient and effective administration of justice. In the words of **Oputa J.SC** (as he then was) in the Nigerian case of *Amaefule & other Vs The State*^[3] he defined abuse of judicial process as:-*

"A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."

It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process was not abused. The black law dictionary defines abuse as *"Everything which is contrary to good order established by usage that is a complete departure from reasonable use"* An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.^[4]

After carefully examining the evidence adduced before me and the papers filed in this court and the suspiciously striking similarity in all the affidavits of service and after carefully analysing the provision of Section 76 cited above, I conclude that the objector abused the court process with the sole motive of obtaining a portion of the said land. He never served the Petitioner with any papers and such conduct amounted to abuse of court process, hence the grant obtained by the petitioner was obtained irregularly, through misuse of court process and with a bad motive.

The next issue is whether or not the objector is entitled to a share in the deceased's estate. The objector claims that he is son to the deceased. The Petitioner states that she did not know him and that he only emerged after the deceased's death. The Petitioner's evidence is that she married the deceased in church on 9.1.2005 and produced the marriage certificate and lived with him for 24 years till he died. When she got married, the deceased was living with his mother, and that he had long separated with his first wife. She insisted that during the 24 years she never saw the objector.

The objector's evidence is that he lives in Nyahururu. Though the issue at hand is weighty, he never explained why the deceased never gave him land while he was still alive and whether there were attempts to discuss the issue or why he had to wait until he died to demand the land. The objector claims he has two other brothers. He never explained why they are not claiming the land or why it is only him who has an interest in the land. The objector never considered it fit to produce a letter from the chief confirming his relationship with the deceased or a birth certificate and the fact that he only emerged after the deceased's death increases the burden upon him to prove that he was a child of the deceased, hence a beneficiary to his estate.

In my view, the practice of persons emerging after the demise of a deceased person purely to claim a share of properties of the deceased person should be discouraged unless the alleged claimant can demonstrate that there were attempts to have him or her recognized as a beneficiary/member of the family during the deceased's life time, or the deceased left clear instructions to that effect, or his claim can be reasonably inferred from the express or implied circumstances of the case including the conduct of the deceased or from such reasonable or probable circumstances that can be proved by way of evidence. Alternatively, such a claim can also be admitted if the claimant demonstrates that he was prevented from associating with the deceased during the deceased's life time by either infirmity of body or mind or both or any other reasonable circumstances. In my view, where someone remains delinked from a family or the person he claims to be a parent for 24 years and only emerges after his/her death, the burden lies on him/her to establish his claim to the deceased's estate and to tender such evidence as may be necessary to establish his claim beyond reasonable doubt.

I am clear in my mind that the burden of prove lies on the objector to prove paternity or his claim to be a beneficiary of the deceased's beyond reasonable doubt. In *Kimani Mathenge Muriuki vs Patricia M. Muriuki & Another*^[5] the court of Appeal emphasised on the need for the person alleging paternity to prove it on a balance of probabilities. The case becomes even more difficult where no medical evidence is adduced to prove paternity or to prove that the deceased's was step father or lawful guardian. No other evidence was adduced except what the objector states. The position is complicated by the fact that the objector emerged only after the deceased's death and 24 years after the Petitioner had been married to the deceased.

It is trite law that the burden of establishing all the allegations rested on the objector and in law he was under an obligation to discharge the said burden. It's not enough to state that the deceased's was his father. He ought to have supported the said allegation by adducing the necessary supporting evidence. This court in *Lewis Karungu Waruiro Vs Moses Muriuki Muchiri*^[6] held that:-

"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds^[7] *remarked:-*

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd^[8] *:-*

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person."

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.^[9] The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,^[10] Lord Denning said the following about the standard of proof in civil cases:-

'The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if

the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist. I respectfully conclude that the evidence tendered by the objector is manifestly wanting and I hereby find the answer to issue number three is in the negative.

Having answered the above issues in the negative, I find that objectors claim cannot be sustained and the same fails for want of proof. Accordingly, I **dismiss the objection and order as follows:-**

- i. That the confirmed grant of letters of administration made on 24th May 2007 to **James Mwangi Wathiga, Jane Wankiju Mwangi and Fredrick Wathiga Mwangi** be and is hereby revoked and or annulled and the same is hereby declared null and void for all practical purposes.*
- ii. That all the transactions that may have been entered into on the strength above grant including the purported registration of title number **Muhito/Mbiuni/186** in the joint names of **James Wathiga Mwangi and Jane Wanjiku Mwangi** are hereby declared null and void for all practical purposes.*
- iii. That the Land Registrar, Nyeri, be and is hereby ordered to cancel the entry made on 14.10.2014 registering **James Wathiga Mwangi and Jane Wanjiku Mwangi** as joint proprietors of the land title number **Muhito/Mbiuni/186** and restore the said name in the name of the deceased **Patrick Mwangi Wathiga**.*
- iv. That a certificate of confirmation of Grant of letters of administration be and is hereby issued to **Jane Wanjiku Mwangi and Fredrick Wathiga Mwangi**.*
- v. That the Land Registrar, Nyeri be and is hereby directed to register Title number **Muhito/Mbiuni/186 measuring 4.1 Acres** or thereabouts in the names of **Jane Wanjiku Mwangi and Fredrick Wathiga Mwangi** to hold the same in trust for themselves and the other beneficiaries of the deceased in equal shares namely, **Isaac Wahome, Margaret Watetu, Mriam Mumbi and Loise Mumbi**.*
- vi. No orders as to costs.*

Right of appeal 30 days

Dated at Nyeri this **9th** day **December** of 2015

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] Succ Cause No. 920 of 2009

[3] (1998) 4SCNJ 69 at 87.

[4] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[5] Succ Cause No 976 of 1994

[6] Hcc No. 106 of 2012

[7]{1955} 1 WLR 948 at 955

[8] {2007} 4 SLR (R) 855 at 59

[9]Koinange and 13 others vsKoinange {1968} KLR 23

[10]{1947} 2ALL ER 372