



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO: 1426 OF 1995

IN THE MATTER OF THE ESTATE OF NGURIRI MUCHENE – (DECEASED)

JUDGMENT

1. The deceased, David Nguriri Muchene, died on 6th July 1981. Representation to his estate was sought on 26th January 1995 by John Karanja Kamau, who described himself as a step-son of the deceased.
2. The filing of the petition attracted objection from Simon Kamande, a son of the deceased, who claimed that he had a right to administration superior to that of the petitioner. He filed a notice of objection, answer to petition and a petition by way of cross-application. The dispute was referred to arbitration by elders in an order made on 24th April 1998 by Owuor J. The elders awarded the disputed land to the objector, Simon Kamande, by their decision dated 13th April 2000. The said award of elders was read to the parties on 9th October 2002. Shortly thereafter the petitioner applied for the setting aside of the said award. The award was set aside on 11th November 2002 by an order of Owuor J, paving the way for the hearing of the objection filed by Simon Kamande. The said objection was struck out on 11th July 2006 for non-prosecution and a grant was eventually made to John Karanja Kamau.
3. The objector thereafter filed a Summons for Revocation of Grant on 12th February 2009, dated 2nd February 2009. He asserted that as the biological son of the deceased he had a prior right to the administration of the estate over the respondent. He also averred that that his purported consent to the application for grant was a forgery, and so was that by Joseph Mwaura and Felicina Muthoni. He said that whereas he was the biological son of the deceased, the respondent's father was a brother of the his, the applicant's father hence the respondent was the applicant's uncle. The said respondent therefore has no claim for the estate for he was neither a biological nor stepson of the deceased. He argued that the grant was obtained by fraud.
4. In reply to the application, the respondent swore an affidavit of protest on an unknown date, but filed in court on 13th February 2009. He countered the applicant's case saying by that the signatures of the applicant and Joseph Mwaura and Felicina Muthoni were not forgeries. He also asserted that the applicant's father was registered as proprietor of Loc.1/Mugomoini/973 as trustee for the respondent's father and his children. He said his family has been in exclusive occupation of the said land and the respondent's father he was buried there in 1995, while the deceased had land elsewhere where he was buried. He also argued that the revocation application was filed after an inordinate delay.
5. The affidavit filed on 13th February 2009 was withdrawn by the respondent and he filed another affidavit on 2nd April 2009 to explain that the applicant and his siblings had agreed to share the subject property with him. Thereafter the applicant and his siblings signed a consent to allow him petition for the grant to be made in his name. He says in the affidavit of 2nd April 2009 that he was therefore surprised when the applicant turned around and filed objection proceedings.

6. The applicant replied to these sentiments by his affidavit sworn on 2nd May 2009. He asserted that the subject parcel of land belonged to his father, and that the respondent was not entitled to a share in the said land. He averred that the land in question was registered in the name of his father, and it being a first registration the same was absolute and indefeasible. He denied that he had consented to the respondent being appointed the sole administrator of the estate. He argued that the respondent fraudulently caused himself to become the sole administrator of the estate.

7. Directions were taken on 16th September 2009 that the application be disposed by *viva voce* evidence. Further directions were given on 23rd November 2009 that the proposed witnesses file witness affidavits. These directions were later altered on 30th May 2011 to the effect that the application would be disposed of by way of written submissions.

8. Following the said directions witness affidavits were sworn and filed by Munga Muchane and Edith Wairimu Muchene. They claimed to be siblings of the deceased fathers of the applicant and the respondent. Their case is that the applicant's father was registered to proprietor of Loc.1/Mugumoini/973 in trust for his brother, the respondent's father. It happened that land adjudication was conducted when the respondent's father was away, and by the respondent's father returned the applicant's father had since died. The clan had then sent and resolved to settle the respondent's father on Loc.1/Mugumoini/973.

9. There are submissions on record filed by both sides. The applicant's submissions are undated and were filed on 29th June 2011. The respondent's submissions are dated 5th June 2012 and were filed on 8th June 2012. The said submissions do not raise legal issues but merely summarise the facts set out in the various affidavits on record.

10. This cause relates to the estate of David Nguriri Muchene who died on 11th June 2007. According to the affidavit in support of the petition, sworn on 21st June 1995 by the respondent, the deceased died possessed of two assets – Loc.1/Mugumoini/973 and Murang'a/Gatanga/Mugumoini/291. According to the papers filed herein the deceased was survived by two biological children – Simon Kamande (the applicant herein) and Joseph Mwaura, and a daughter in law – Felista Muthoni P. Kabugi – the widow of a dead biological son of the deceased. The applicant described himself in the petition as a stepson. The respondent described him as an uncle, while the affidavits by other witnesses described more as a cousin of the applicant. It is common ground therefore that the respondent was neither a biological son of the deceased nor his stepson.

11. The intestate estate of a person who is survived by children but no spouse, such as that of Nguriri Muchene, is for distribution in terms of *Section 38* of the Law of Succession Act. The said provision states as follows:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

12. I have stated above that the respondent in this case is not a child of the deceased. He is therefore not entitled to a share in the intestate estate of the deceased herein. He asserts a trust on the estate property, but the said trust has not been declared by any court. Consequently, there is no basis upon which he can stake a claim in the estate of the deceased. This probate court is concerned only with distribution of property belonging to the deceased. It is not for me to determine existence of an alleged trust. Jurisdiction over that matter lies elsewhere. The respondent ought to have moved the appropriate court for appropriate orders with regard to the alleged trust. The respondent can only stake a claim in the estate following a declaration of trust in his favour.

13. The application before me mainly seeks revocation of grant on the basis that it was obtained fraudulently *Section 66* of the Act sets out a list in order of preference of persons who are entitled to administration in intestacy. The said list is dependent on the order of priority of those entitled to inherit.

At the top of the list is the surviving spouse, followed by children, parents, siblings, half siblings and other relatives thereafter. Going by the order of preference stated in *Section 66* of the Act, the applicant is at the top of the pile given that there is no surviving spouse and the respondent is way at the bottom in his capacity as “other relative.” A grant ought not have been made to the respondent to the exclusion of the applicant.

14. In view of the foregoing I will make the following orders:-

1. That the grant made to John Karunju Kamau on 11th June 2007 and confirmed on 26th January 2009 is hereby revoked.
2. That the certificate of confirmation of grant made on 26th January 2009 is hereby cancelled and so are any transactions conducted on the basis of the said certificate of confirmation of grant.
3. That Simon Kamande Muiruri is hereby appointed administrator of the estate of David Nguriri Muchene and a grant of letters of administration intestate shall accordingly issue to him.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE