



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 389 OF 2009

LESIT, J

IN THE MATTER OF THE ESTATE OF

ELIJAH M'IMARIRIA KIRINGURI.....DECEASED

VERONICA MWOTHIRUPETITIONER

VS

ALEXANDER NKUNJA M'IMARIA.....OBJECTOR

JUDGEMENT

1. By a Summons for Revocation of grant dated 25th June, 2012, brought under Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules, the Objector herein seeks revocation of the Letters of Administration granted to the Petitioner and confirmed vide Certificate of confirmation of grant dated 14th July, 2011.
2. The Objector bases his quest for revocation on the grounds cited on the face of the application thus;
 - I. **That the proceedings to obtain the grant were defective in substance.**
 - II. **That the grant was obtained secretly and without the knowledge of the Objector herein.**
 - III. **That the grant was obtained by the concealment from the Court of material facts that the Objector and her sister Julia Mukiria were entitled to a share of the Deceased's estate by virtue of being a daughter and son respectively of the Deceased.**
 - IV. **That the grant shall totally and illegally disinherit the Objector and his sister.**
3. The application was supported by an affidavit sworn by the Objector dated 25th June, 2012. The Petitioner, on 26th July, 2012, filed a Replying Affidavit with several annexures thereto. The parties agreed to have the application heard by way of viva voce evidence. The Petitioner called three witnesses while the Objector also called three witnesses.

4. PW 1, GABRIEL LUNGE ELIJAH was son of the deceased with MARY AKOU born 54 years ago, and that is not in dispute.

He testified that his mother Mary Akou left his father and that he lived with Veronica, the Petitioner herein who also brought him up. That Mary Akou was married by his father's brother and therefore his uncle Gideon M'Irangu. PW1 testified that the two were blessed with four children, Alexander Nkunjia, Catherine Mwari, Julia Mukiria and George M'Nkuthu. PW1 stated that Gideon gave land to Alexander Nkunjia, George and Catherine but not Julia. The Certificates of Search are annexed to the Replying Affidavit of Veronica, the Petitioner herein.

5. PW1 said that he lives on his father Elijah's land, LR No.Ithima/Ntunene/558. He also admitted that his step mother, Veronica got other children with one Ishmael but said that even then, Veronica did not leave their home even when she befriended Ismael. PW1 testified that the children Veronica got with Ismael went with Ismael.

6. PW2 Veronica Mwonthiru Elijah testified that Elijah M'Imaria was her husband. That at the time of her marriage to him, Elijah did not have a wife but that she found in his homestead a child who is PW1, Gabriel Lunge. PW2 stated that Elijah's brother, Gideon also deceased, took away Gabriel's Mother, Mary, and was married to her according to Meru customs. She stated that the two lived on her late husband's (Gideon) farm, LR Ithima/Ntunene/558. Veronica produced green cards exhibits 1, 2,3,4 and 5 showing lands given by Gideon to the Objector and his siblings.

7. In cross examination, Veronica testified that the deceased in this cause told her that he had been living alone for 2 years before the marriage. She also testified that since she got married to the deceased, Mary Akou never went to their home and further that she did not even attend the Deceased person's funeral.

8. Veronica stated that when she went to Elijah's homestead she did not find Akou's house. Veronica admitted that she got 4 children with one Ishmael but stated that he was merely a friend, and that he took the children they got together away.

9. Veronica denied that she chased or instigated the chasing away of Alexander, Julia and Mary Akou when Elijah died. She stated that before her husband died he told his brothers to ensure Mary Akou and his brother Gideon did not attend his funeral.

10. PW3 was Julius Ntarangwi Kaumbuthu. He testified that The Objector, Alexander's mother was Mary Akou. That he is 54 years old. That Veronica brought up Gabriel, PW1. That it is Gideon who looked for a wife for Alexander and paid for her dowry. PW3 said that he does not know when Mukiria and Alexander were born. Regarding Mary Akou, PW3 stated that she was taken by Gideon, Elijah's brother when the latter was away at his working place.

11. The objector's case consisted of the evidence of 3 witnesses.

OW1, Mary Akou testified that Elijah M'Imaria was her husband and that he had 2 other wives, Veronica and Karoki. Later she contradicted that by saying that she did not know whether Veronica was ever married to Elijah. OW1 stated that she and the deceased Elijah had 3 children Gabriel Lungi, George Kaumbuthu and Julia Mukiria. On further examination she included Alexander as among the children she had with the deceased.

12. OW1 testified that Jacob Kinyunjuri, a brother of the deceased, chased her and her children from the farm when the deceased died. She alleged that it was Veronica, the Petitioner, who asked Jacob to chase them away. OW1 stated that when Elijah died the Petitioner got married to Jacob. OW1 also testified that by the time she went to Gideon's place, Lunge, Alexander and Julia were already born. She denied that a person can leave her husband and marry his brother.

13. OW1 denied that she ever married to Gideon. Mary stated that by the time Elijah died and she went to Gideon, she already had three children, these being Alexander, Nkunja and Kaumbuthu. On further cross-examination, she said she also went with Julia. OW1 testified that she was not given any land by Gideon. However she admitted that Catherine, George and Alexander were given by Gideon, but explained it was payment to them for working for him.

14. OW2 was Alexander NkunjaM’Imaria, the Objector. OW2 testified that he was born in 1967. He said that his mother, OW1 had three children with the deceased Elijah being Gabriel Lunge, Julia Mukiria and himself. He stated that they all lived on Elijah’s land until three weeks after Elijah’s death when they were chased away. OW2 stated that even though he went to live in Gideon’s land, he still went back to work in deceased land. OW2 testified that Gideon gave him land after he worked for him. However he admitted that Julia did not get any land and had also not claimed any in this case. OW2 testified that Gideon died in the year 2000.

15. OW3 was Moses Kubai and he said that in 1974 he was around 15 years because he was born in 1957. He stated that Elijah was the father of the Objector, and that he had 3 wives. That Alexander and the rest of his family went to Gideon’s place when they were chased away by Jacob. That Mary Akou’s house was taken over by those left there.

16. Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya pursuant to which the instant application is premised 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 any 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 the 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 an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

d). that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed or

ii. to proceed diligently with the administration of the estate or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular or

e). that the grant has become useless and inoperative through subsequent circumstances.

17. The Objector's application pleaded that the proceedings to obtain the grant of letters of Administration were defective in substance; that the grant was obtained secretly and without the knowledge of the Objector herein; that the grant was obtained by the concealment from the Court of material facts that the Objector and his sister Julia Mukiria were entitled to a share of the Deceased's estate by virtue of being a daughter and son, respectively of the Deceased and that the grant shall totally and illegally disinherit the Objector and his sister.

18. The Objector did not adduce any evidence to show the defects in the proceedings as alleged on the face of the application for revocation. There was no evidence adduced, and neither was any attempt made to demonstrate the allegation that the grant herein was obtained secretly and without the knowledge of the Applicant. The other important fact to note is that even though this application is stated to have been brought by the Objector on his behalf of his sister, Julia Mukiria, the said Julia has not supported the Objector's case at all and neither was she called as a witness.

19. The crux of the Petitioner's witnesses' evidence was that the Objector was not entitled to inherit the deceased, for reason of not being his offspring and secondly for reason he inherited from one Gideon who the Petitioner maintains was his father for reason he sired him. The crux of the Objector's evidence was that the Objector and his sister, Julia were offspring of the deceased, that they were entitled to inherit him but had been disinherited. The major issue at hand therefore is the paternity of the Objector/Objector and whether he is entitled or not to inherit the Deceased.

20. No birth certificates or other conclusive documentary evidence was produced to establish or prove the Objector's paternity; or even to disprove this. I have to consider the oral evidence adduced and embark on an analysis of same in order to decipher the preponderance of the position it points to on a balance of probabilities.

21. Several issues arise. Firstly, was the Objector's mother, Mary Akou, residing in the Deceased person's homestead when the Petitioner entered the Deceased's homestead?

OW1, the Objector's mother says that she lived in the homestead when the Petitioner was married. But both PW1 and PW2 say this was not the case. PW1 said that he grew up knowing the Petitioner as his mother until he was informed that his biological mother was Mary Akou. He said that by the time he was of age to know things, Mary Akou was living with Gideon. PW2, the Petitioner, says Akou was not living in the homestead of Elijah but was already living with Gideon when she was married to Elijah.

22. The question is why would PW1 testify contrary to his biological mother's evidence? None of the witnesses including Akou herself dispute that PW1 is her first son. In the absence of an explanation from Akou why her son appears from his evidence to be detached from her, the only conclusion one can make is that PW1, PW2 and PW3 are being truthful that PW1 grew up with the Petitioner as his mother.

23. The foregoing is consistent with the absence of Akou from the Elijah's homestead as at the time of the Petitioner's marriage to him. That would also put credence and explain the evidence of PW1 that he did not know his mother was OW1 until he was mature. The only probable explanation for that being the fact OW1 was estranged from the deceased and was no longer living with him. There being no other place she has mentioned as her habitat around that time, this habitat must surely have been the home of Gideon.

24. As at 11th December, 2012, when he testified, PW1's age was 54 years. PW2, evidently illiterate, and incapable of numerically stating years let alone manipulating them, states she was married the year before the flag was lifted (1962). PW1 was by his evidence born around 1958; a difference of 3 to 4 years. This supports the evidence the Petitioner gave that when she arrived at Elijah's home as his wife, PW1 was a child with only the front teeth.

25. I have gone further to consider other independent piece of information. I have looked at the Chief's letter where it shows the age of the Petitioner's first Child. In 2009 when the letter was written, Stanley Ntongai Kiringuri was 47 years old. Today he will be about 52 years old; about only 4 years younger than

PW1 today. By simple arithmetic, it emerges that he was born in 1962 -1963, around the same year the Petitioner gives as year of her marriage. It can only follow that the Objector was fathered away from the deceased person's homestead and definitely not by the deceased.

26. Secondly, did the Objector, his mother and siblings reside in the Deceased person's homestead as at the time of the Deceased person's death? Having sufficiently established the estrangement of the Objector's mother from the Deceased, it follows that the only way she could have been in the Deceased person's homestead at the time of his death is if she somehow returned there. No evidence of such return is adduced. Instead there is unrequited evidence from PW2, that the deceased at the time of his death asked his brothers not to allow Akou and Gideon to his funeral. This is evidence of the ultimate estrangement. Arguably, the deceased carried his strong disaffection with the Mary Akou and Gideon beyond the grave.

27. PW3 says it was commonly known in the area that Gideon had taken Akou in the absence of the deceased, Elijah when he was at work. This offers an explanation for the apparent bitterness Elijah had of his former wife Akou and his brother Gideon to the extent of requiring his other brothers to ensure the two did not participate or attend his burial. It must have emanated from a despondent sense of fraternal betrayal.

28. The evidence of PW3 complements that of PW1 and 2. On a balance of probabilities I find that it is more probable that Akou, the Objector's mother was not living in the deceased person's homestead at the time of his death; and neither could the then Objector who was 7 years old then have been living there. This is more so, particularly since the Objector gives no account of having stayed apart from his mother Akou. I find that the reason for them not being there in 1974 is that they were in Gideon's homestead and the deceased could not have been the Objector's father.

29. Thirdly, for what reason did Gideon give the Objector two portions of land? For what reason did he give Catherine Mwari and George Kaumbuthu land? Why was Julia Mukiria left out in the list of recipients of Gideon's land? I have chosen to look at these issues together.

30. The Objector states he was given this land for his labour to Gideon as consideration. However the picture painted of Gideon is that of an acquisitive and relatively wealthy person owning residential plots, land and other property. It is not probable that he could have amassed his wealth by exercising a policy of giving his land to strangers in return for labour. He then gave land to Catherina and George too. Were these mere labourers too? with no biological connection to him,? Could he have used ancestral land as payment for casual labour? In the middle of all these unresolved questions, it would have helped to get an answer as to why Julia did not get land. Was she the only "stranger" living in Gideon's homestead who did not offer him labour? If Gideon was generous to Mary Akou's children, why did he leave out Gabriel Lunge?

31. There must have been a special reason for Gideon to have given the land to the three. The more plausible explanation is that these were indeed his biological children and that he was obligated to secure their futures by giving them their rightful inheritance by giving them his land.

32. It would then appear the reason Julia was not included was that she was already married at the time and considered secure in her matrimonial home. It is instructive that even though this application was filed in her respect as well as that of the Objector, as earlier stated, the Objector made it clear that Julia was not interested in the application and that she was not pursuing any inheritance from the estate of the deceased.

33. The Objector's evidence and that of his mother, OW1 was full of contradictions and inconsistencies. OW1 testified that Elijah M'Imaria was her husband and that he had 2 other wives, Veronica and Karoki. Later she contradicted that by saying that she did not know whether Veronica was ever married to Elijah.

34. OW1 did not seem sure of the number of children she had and who their father was. OW1 stated that she and the deceased Elijah had 3 children and she named them as Gabriel Lunge, George Kaumbuthu

and Julia Mukiria. On further examination in chief, when asked about Alexander she stated that her children with Elijah in order of birth were Gabriel, George and Alexander. When asked by her counsel about Julia, OW1 stated that she too was her daughter with Elijah. This brought the number of children she had with Elijah to four. OW1 did not explain the discrepancy in the number her children who she claims were fathered by Elijah.

35.OW1 also testified that by the time she went to Gideon's place, Lunge, Alexander and Julia were already born. She did not mention George. OW1 looked confused about the children she got with Elijah.OW1 denied that she ever got married to Gideon. Yet she admits that she still lives on Gideon's land to date.The only explanation for all these is the fact OW1 was Gideon's wife and that the children she had with him are the ones Gideon bequeathed his land to before his death. OW1 lied about many facts.

36.OW1 stated that Gideon did not give any land to Alexander and Julia. That is however proved to be false as the Certificates of Search showing land Alexander got from Gideon are on record. Alexander, OW2 confirmed he got land from Gideon but explained that Gideon was paying him for work he did for him. OW1 was therefore not telling the truth.

37. OW2 contradicted OW1's evidence. OW2 testified that he was born in 1967. He said that his mother, OW1 had three children with the deceased Elijah being Gabriel Lunge, Julia Mukiria and himself. This means that while OW1 did not seem to consistently know who sired her children, OW2 stated that himself, Julia and Gabriel were children of the deceased. George was nowhere mentioned by OW2 yet from the evidence before court, which is undisputed George was older than Alexander, and so if OW1 was fathered by Elijah, then George should have too. That contradiction in OW2's evidence was not explained or resolved.

38. The evidence of OW1 and 2 dragged in issues of infidelity against the Petitioner for having children outside her marriage to Elijah. The Petitioner did not deny having other children with one Ishmael. Those children were born long after the deceased Elijah died. There is no dispute that even though Petitioner got children with another man after her husband died, she never left her home. Those children were also taken by their father and it was not in dispute. I find that giving birth by another or other men but not marrying them does not affect the Petitioner's right of priority to petition in this case and her right to inherit from deceased estate.

39.In JANET KARIMI Vs CEASER RIUNGU AND MISHECK RIUNGU, Meru Miscellaneous Sucession Cause No. 65 of 2000, Kasango J said inter alia;

“In respect of the petitioner's paternity, I find that he did not neither did his wife prove that he was the son of the deceased to the required standard. The evidence that comes out clearly is that the petitioner left the deceased home with his mother in 1968. The fact that he bore the deceased name as his surname did not suffice in the test of his parentage. I find that the petitioner just as his mother informed the deceased was not the son of the deceased and was therefore not entitled to inherit the suit land.”

40. That case answers OW2's identity card which he produced showing he had deceased surname. That is not sufficient proof of paternity, as anyone can adopt any name they wish and acquire registration in such adopted names. I am persuaded by the above case.

41. I find that the Objector has been unable to establish that Elijah, the deceased in this case was his father, and that consequently he has been disinherited. Based on all the foregoing I have formed the opinion that the Objector has failed to prove his paternity as stemming from the Deceased. I find that all evidence adduced herein points to only one conclusion, that the objector was the son of Mary Akou with Gideon M'Arungu, and that Gideon provided for him in the distribution of his, Gideon's estate. I find that the Objector has no right of claim from the estate of Elijah.

42. I find that the evidence by PW1 and 2 was consistent, corroborative and accurate. I find that there was no chance of any collusion by the two witnesses, rather that spontaneous. The demeanor of the two witnesses was, in my observation good and gave the impression that both were honest, forth right and worthy of belief. I believed their testimony as truthful.

43. I have looked at the proceedings and the confirmed grant and I have confirmed that all the beneficiaries of the deceased have been provided for.

44. Having carefully considered the entire evidence adduced before me and the submissions of both counsels, I have come to the conclusion:

i). That the proceedings to obtain the grant were not defective in substance or at all.

ii). That the grant of Letters of Administration was not obtained secretly and without the knowledge of the Objector herein.

iii). That the grant was not obtained by the concealment from the Court of material facts; and more particularly, the Objector and her sister Julia Mukiriaare not entitled to a share of the Deceased's estate not being a daughter and son respectively of the Deceased.

iv). That the grant does not disinherit the Objector and his sister since they are not entitled to any inheritance from the deceased herein.

45. In the result I order as follows:

i). The Objection herein fails and is hereby accordingly dismissed.

ii). The confirmed grant of Letters of Administration dated 7th March, 2012 and issued by this court on the same day be and is hereby upheld.

iii). Each party to bear their own costs of this Objection and proceedings.

DATED AT MERU THIS 3RD DAY OF APRIL, 2014

LESIT, J.

JUDGE.