



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

SUCCESSION CAUSE NO. 284 OF 2009

IN THE MATTER OF ESTATE OF

NJUGUNA THAGICU (DECEASED)

BETWEEN

JOSPHAT NJERU GITHINJI.....APPLICANT

AND

RENSON NYAGA NGUU.....PETITIONER/RESPONDENT

RULING

1. Njuguna Thagicu died on 18th September 1982. The grant of letters of Administration was issued to Renson Nyaga Nguu, a grandson of the deceased. The Certificate of Confirmation of Grant was issued on 18th February 2010. The property of the deceased, land parcels Ngandori/Kirigi/2587 and Ngandori/Kirigi/2590 was divided among his grandchildren; Ephantus Njagi Nguu, Renson Nyaga Nguu, Perris Muthoni Nguu, Morris Mbogo Nguu and Moffat Njeru Nguu.
2. The applicant seeks to revoke the grant of confirmation of letters of administration for the estate of Njuguna Thagicu (deceased). In his summons dated 14th July 2010, he claims that grant was confirmed fraudulently by making a false statement and concealment from the court material facts relevant to the cause and that it was obtained by means of untrue allegation of fact essential in point of law to justify the grant and the proceedings were defective in substance.
3. The summons is supported by the affidavit of the applicant sworn on 14th July 2010. The respondent opposes the application by his affidavit sworn on has sworn on 17th December 2010. The applicant and respondent testified and their respective counsel made oral submissions.
4. Certain facts are common cause. Njuguna Thagicu (deceased) had two children; Elijah Nguu Njuguna who is the father of Renson Nyaga Nguu, the respondent, and Elizabeth Wandu Njuguna, the mother of the applicant.
5. The applicant case is prior to her death his mother Elizabeth has been given one acre of Plot 2590 and two acres were given to the petitioner's father Nguu. He avers that the petitioner failed to disclose that the deceased had a daughter who was entitled to inherit the property.

6. The position of the respondent is that although the petitioner is the son of Elizabeth Wandu, a daughter of the deceased, he is not heir to the deceased's estate. He avers that Elizabeth was married to one Njiri Kiriro of the *Andu a Kathuci* Clan and when she died she was buried at her husband's property in Mukangu, Kiine. He asserts that the applicant does not belong to the clan of the deceased, that of *Andu a Mbugi* but to the clan of *Andu a Kathuci*, the clan of his father. He also avers that the applicant has inherited land from his father which he sold and bought other land.

7. The deceased died in 1982 after the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** came into force and accordingly the matter is governed entirely by the **Act**. The effect of the **Act** was to replace customary law entirely in matters of succession. The issue for determination is whether the applicant, the deceased's grandchild is entitled to a share in the intestate of his deceased grandfather.

The deceased died intestate and therefore distribution of the estate is subject to **Part V** of the **Law of Succession Act**. Under **Part V** of the **Act** (and especially **sections 35, 38 40 and 41**) children of the deceased are entitled to a share of the estate of their deceased parent. So long as the children are alive, grandchildren are not entitled to anything except if they apply for provision under **section 26** of the **Act** as dependants of the deceased during his lifetime. Where a child of deceased is dead, his or her children are entitled to take the share that ought to have gone to the dead parent (See Musyoka J., **Re Estate of Gathui Kamau Njango (deceased) Nairobi P & A No. 172 of 2007 [2013]eKLR**). The principle of substitution is set out in **section 41** of the **Act** provides as follows;

Where reference is made in this Act to the "net intestate estate," or the residue thereof devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees in equal shares, the share which their parent would have taken had he not predeceased the intestate.

8. The applicant, as a child of the daughter of the deceased, is entitled to take the share that that child of the deceased was herself entitled to. The principle of equality between children is no longer in doubt and was clarified and given judicial imprimatur in the case of **Rono v Rono and Another Eldoret CA Civil Appeal No. 66 of 2002 [2008]eKLR**. The reference to children under **Part V** of the **Act** does not discriminate between sons and daughters or between married and unmarried daughters. Hence the argument that Elizabeth was married and the applicant belongs to another clan is inconsistent with the express intent of the **Act**. Elizabeth was therefore entitled to a share in the estate of her father and since she is dead the applicant qualifies to get her share. Such a share is a right and not an entitlement and can only be renounced by the applicant himself.

9. **Section 76** of the **Law of Succession Act** provides:-

A grant of representation, whether or not confirmed, may at my 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 court of something material to the case;

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

10. From the time the petition (Form P&A 80) was lodged, the fact that the deceased had a daughter, Elizabeth Wandu, was not disclosed. Only the children of the deceased's male son were named in the application. The letter of the chief dated 28th May 2009 did not disclose the existence of Elizabeth.

11. The applicant is a survivor of the deceased by dint of being a child of a dead child of the deceased. That fact was not disclosed to the court and therefore amounted to concealment from the court of something material. It also amounted to an untrue allegation of a fact that the deceased has no other heirs. It is for such concealment and untrue allegations that grants are revoked. If the applicant's mother, Elizabeth Wandu, were alive she should have been listed as a survivor of the deceased, but as she now deceased her place ought to have been taken by her children just like the grandchildren of the deceased's son, Nguu Njuguna. If Elizabeth were alive and was omitted on account of her marital status that too would be good ground for revocation.

12. I find and hold that the children of Elizabeth Wandia have the same right to be treated equally as those of Njuguna Nguu.

13. In the circumstances and for the reasons I have advanced I hereby revoke the certificate of confirmation of grant dated 18th February 2010. As this is a family matter, each party shall bear his own costs.

SIGNED AT NAIROBI

D.S. MAJANJA

J U D G E

DATED and DELIVERED at EMBU this 29TH day of MAY 2014.

H. I. ONG'UDI

J U D G E

Mr Njeru instructed by Mugambi Njeru and Company Advocates for the applicant.

Mr Njage, instructed by Morris Njage and Company Advocates for the petitioner/respondent.