



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO. 24 OF 2002

IN THE MATTER OF THE ESTATE OF MUIRURI MUCHORO –(DECEASED)

RULING

1. The file from the Thika Chief Magistrate's court in respect of **Thika Chief Magistrate Court Succession Cause No. 39 of 1987** is a reconstructed file. It is therefore not altogether complete. The photocopies availed to the court in that matter indicates that the deceased, Muiruri Muchoro, died on 10th February 1986. Representation to his estate was obtained on 4th July 1988, when a grant of letters of administration intestate was made to Esther Nyokabi Muiruri and Rachel Muthoni.
2. The affidavit sworn by the petitioners' on 13th March 1987 indicates that the deceased was survived by three widows – Rachel Gathoni, Serah Wairimu and Esther Nyokabi and an unmarried daughter, Priscilla Wanjiru. There was also a consent to the making of grant intestate to persons of equal or lesser priority, which is undated. The same was signed by four persons who are described as sons and a daughter of the deceased. This would mean that the affidavit in support of the petition did not disclose all the survivors of the deceased. The persons who signed the said consent were John Chege, Arthur Njoroge, Erustus Kiruri and Mercy Waringa.
3. The deceased was said to have died possessed of five assets, namely – Loc.1/Kiunyu/525, Loc.1/Kiunyu/559, Loc.1/Kiunyu/704, Loc.1/Kiunyu/Plot "A" 4 and motor vehicle KQU 086.
4. The grant was confirmed on 25th February 1993. The affidavit sworn in support of the application for confirmation, on 28th March 1989, disclosed that the deceased was survived by a far larger number of persons than that disclosed in 1987 when the grant was being sought. In the confirmation application he was said to have been survived by three widows – Rachel Muthoni, Serah Wairimu and Esther Nyokabi; eleven daughters – Mary Warigia, Beatrice Wanjiru, Margaret Nduta, Nancy Waringa and Wambui Muiruri; and eight sons – John Chege, Arthur Njoroge, Erastus Kiruri, Simon Njuguna, Joel Mburu, Stanley Njoroge, James Nganga and Chrispus Njoroge.
5. According to the certificate of confirmation of grant dated 28th February 1993 the estate was shared out between Esther Nyokabi, Simon Njuguna (who to hold interests for his two brothers), Rachel Muthoni and Philisila Wanjiru.
6. On 7th August 2001, Arthur Njoroge and John Chege filed a summons dated 6th August 2001 seeking revocation of the grant made on 4th July 1988. The said application was responded to by the respondents who filed affidavits in reply. The summons was amended by an order made on 19th July 2010 and it was subsequently withdrawn on 7th March 2011.
7. A fresh summons for revocation of grant dated 3rd February 2011 was lodged in court on 7th February

2011. It sought orders that the grant made on 28th February 1993 be revoked. It is pegged on the grounds that the process to obtain it was defective and founded on fraud and misinformation. The details of the defects in the process and the misinformation are set out in the affidavit in support sworn on 3rd February 2011 by the applicant. He says that his consent to petition for the grant was not obtained, beneficiaries were not disclosed and that the thumb print on one of the consents was false.

8. The reply to the application was filed on 16th March 2011 by one of the administrators, Simon Njuguna Muiruri, by way of an affidavit sworn on 16th March 2011. He did not in his reply address the issues raised by the applicant in the supporting affidavit sworn on 3rd February 2011, as to the defects in the process under which the grant in force was obtained in 1988 and the misinformation that was allegedly fed to the court at the time. He dwells on distribution of the estate, which is not relevant as the applicant has not touched on it in his affidavit. The allegations by the applicant have therefore not been controverted by the respondents.

9. In paragraphs 1,2,3,4 and 5 above, I have mentioned the process that was undertaken at the **Thika Chief Magistrate's Court Succession Cause No. 39 of 1987** from the time of applying for the grant up to the time the same was confirmed. I have noted that only a few of the children who survived the deceased were mentioned and that a full disclosure of all the children of the deceased was made at the confirmation stage.

10. The impression created at the petition stage is that deceased was survived by three widows and a daughter. Then there was filed a consent signed by four persons, who were described as sons and a daughter, suggesting that the deceased was survived by more than the four persons mentioned in the affidavit in support of the petition. The confirmation application unearthed more survivors – the total list of survivors came to twenty two (22) persons – three widows, eight (8) sons and (11) eleven daughters.

11. The law governing the process of applying for grants of representation is **Sections 51** the Law of Succession Act and rule 7 of the Probate and Administration Rules. These provisions state the information that ought to be disclosed at this stage. For purposes of an application where the deceased died intestate, **Section 51(2) (g)** and rule 7 (1) (e) of the Probate and Administration Rules are relevant. They state as follows-

“51 (2). An application shall include information as to –

(a)...

(b) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased...”

“7(1). Subject to the provisions of sub rule (9), where an applicant seeks a grant of representation to the estate of deceased person to whose estate no grant ... has been made, the application shall be by petition supported by an affidavit... containing, so far as may be within the knowledge of the applicant, the following particulars-

a. ...

e. **In cases of total or partial**

intestacy –

i. **The names, addresses, marital state and description of all surviving spouses and children of the deceased...”**

12. The provisions set out above are in mandatory terms. They both envisage that the applicant or petitioner shall disclose all the surviving spouses and all the surviving children of the deceased. As indicated above the deceased was survived by twenty two (22) persons, being widows and children, yet only four were listed as surviving him. The mandatory provisions of **Section 51** of the Act and rule 7 of the Rules were not complied with. It is that non-compliance that appears to fuel the mistrust that is bedeviling these proceedings.

13. **Section 76** of the Law of Succession Act allows the revocation of a grant where the process of obtaining the same was defective or attended by fraud and misrepresentation. The failure to comply with mandatory provisions of the law makes a process defective, while the non-disclosure or concealment of as many as eighteen (18) persons distorts the picture presented to the court and amounts to misrepresentation.

14. I am satisfied that the applicant in respect of the application dated 3rd February 2011 has made out a case under **Section 76** of the Law of Succession Act for the revocation of the grant made in this cause. I do note that the original grant was made in 1988 and a fresh or amended one in 1993. However, so long as the legitimacy of the original grant is suspect, the subsequent one cannot hold.

15. In the end, I hereby make the following final orders:-

(a) That the grant herein made on 25th

February 1993 to Simon Njuguna Muiruri, Esther Nyokabi Muiruri and Rachel Muthoni Muiruri in **Thika Chief Magistrate's Succession Cause No. 39 of 1987** is hereby revoked;

b. That the court file in respect of the **Thika Chief Magistrate's Court Succession Cause No. 39 of 1987** shall be returned to the Thika Chief Magistrate's Court where the parties shall apply afresh for grant of representation intestate to the estate of Muiruri Muchoro;

c. That in the fresh application ordered in (b) above, the parties shall comply fully with **Section 51** of the Law of Succession Act and rule 7 of the Probate and Administration Rules; and

d. That costs shall be and the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF May 2014.

W. MUSYOKA

JUDGE

In the presence of Miss. Mburu advocate for the applicant.