



IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 251 OF 2000

IN THE MATTER OF THE ESTATE OF RITARA ITHAURA(DECEASED)

CHARITY GACHERI KABURU.....PETITIONER

VERSUS

MARY GACHERI M'RITAA.....INTERESTED PARTY/APPLICANT

J U D G M E N T

The interested party/applicant through an application dated 26th January, 2011 brought pursuant to Section 76 and 47 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules sought that the grant of letters of administration issued to Francis Kaburu on 19th February, 2001 and confirmed on 21st January, 2003 be revoked and/ or annulled and the title deed in respect of Land Parcel No. Abothuguchi/Upper-Kaongo/836 issued to Francis Kaburu be cancelled and the same do revert to the name of the deceased RITARA ITHAURA. The application is based on the grounds that the grant was obtained fraudulently by making a false statement and concealment from the court something material to the cause. That proceedings to obtain the grant were defective in substance and grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant and the same has subsequently become useless and inoperative through subsequent circumstances.

The application is supported by the applicant's affidavit dated 24th January, 2011. The respondent on the other hand is opposed to the application. The respondent countered the applicant's application through her replying affidavit dated 7th June, 2011.

On 21st March, 2012 court gave directions that the applicant's application dated 26/1/2001 be heard by way of viva voce evidence. The applicant gave evidence in support of her application and called two witnesses, whereas the respondent gave evidence and called one witness. The parties counsel subsequently filed written submissions in support of their opposing positions. I have carefully considered the application, the affidavit in support, replying affidavit and counsel respective written submissions and the provisions of the law. The issue for determination in this case can be summarized as follows:-

1. ***Whether the applicant has established sufficient grounds to warrant revocation of the grant issued to Francis Kaburu?***
2. ***who should be administrators in case the grant is revoked.?***
3. ***what assets formed the estate of the deceased RITARA ITHAURA and how should the estate be distributed?***

The interested party/applicant evidence through herself as PW1, and her two witnesses PW2 and PW3 is that the deceased RITARA ITHAURA had two wives and that he died in 1968. The first wife had two children namely Kirinya, father to FRANCIS KABURU(deceased), and VENEDETTA NGUGI, the 2nd wife JERRICA KIRINDI had 4 and the surviving children are:-

1. KARASIKA NGUGI
2. BERNARD MBOBUA
3. MARY GACHERI

That RITHARA ITHAURA(deceased) had two parcels of land Abothuguchi/Upper-Kaongo/836 and Igane/717. The interested party averred that the deceased during his lifetime he gifted Abothuguchi/Igane/717 to his son Kiriinya(deceased). The interested party provided green card in respect of plot NO.836 as exhibit P1 and in respect of Plot No.717 as exhibit P2. PW1 and PW2's children of RITHARA ITHAURA averred that FRANCIS KABURU when he filed this cause he did not notify them and that they did not execute any document authorizing him to petition for the grant being a grandson of the deceased. That they did not agree before their area Chief on the confirmation of the grant and specifically stated they did not consent to confirmation of the grant. PW1, PW2 and PW3 testified that RITARA ITHAURA gave Abothuguchi/Lower Kaongo/717 to Kiriinya father to Francis Kaburu and as such the respondent should not seek any share from Abothuguchi/Upper-Kaongo/836 as she is not entitled.

The respondent gave evidence as OW1 and called OW2. The respondent testified that she was substituted in this cause following the death of Francis Kaburu her late husband. The initial petitioner. She produced a copy of a limited grant issued to her in respect of the estate of Francis Kaburu as Exhibit O1. OW1 and OW2 testified that all the deceased beneficiaries were aware of the filing of the petition and all agreed to Francis Kaburu petitioning for the grant. She listed those who were present to include Kirinya(deceased), Benedict, Mary Gacheri, Bernard, Rinkanya Rithaura.

The respondent and her witness agreed with the evidence of the interested party that the deceased herein had two wives .The first wife who was OW2, a daughter in-law to the deceased named as Matera Ritara was mother to Kiriinya and Ngugi(deceased) whereas the 2nd wife was named as Gakuruga Ritara had 4 children whom she named as

1. Nchama, 2. Makuyu(deceased) 3. Mbuba and 4. Gacheri.

According to the respondent and her witness the deceased had only one parcel of land Abothuguchi/Upper/ Kaongo/836 which land has been occupied and used by Bernard Mbobua and family of Francis Kaburu(deceased) and which land is subdivided into two equal portions. OW1 averred that she has been in occupation of the land since 1987. That the land was shared by elders and that the interested party started using the land recently but on the portion awarded to Bernard Mbobua her brother who is not married. That each of the parties has developed their respective portions. That the land was shared according to the deceased two houses or his two wives and each side uses their mother's share. The respondent had no objection to the land being shared as per existing occupation and boundaries as she recognizes the interested party is entitled to ½ share and went on to state transfer could not be effected as Bernard Mbobua do not have identity card and on being called for his share he had declined to take necessary steps to cause the transfer in his name.

The interested party avers that she was not notified of filing of the petition nor did she give consent to petitioning of the grant and subsequent confirmation as a daughter to the deceased. PW2 son of the deceased similarly denied having been informed of the petition of the grant of letters of administration and its subsequent confirmation. OW1 and OW2 testified all family members were aware of the petitioning for the grant and indeed consented to FRANCIS KABURU petitioning for the grant and that even the matter was taken to the area Chief. The interested party is said to have refused to co-operate.

Rule 26(1) and (2) of the Probate and Administration Rules provides:-

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

From the evidence of the interested party and her witness and that of the respondent and her witness I find that FRANCIS KABURU(deceased) gave oral notice to the interested party and other family members of his intention to petition for the grant. I do not agree with the interested party and her witnesses that they had no notice of petition for the grant because PW1 stated she appeared before area chief and declined to offer her support. The petitioner FRANCIS KABURU however was in breach of R 26(2) of the Probate and Administration Rules as he did seek the renunciation or written consent of all persons entitled in a degree equal to or lower than that of his before he petitioned for the grant.

Furthermore Rule 40(8) of the Probate and Administration Rules provides:-

“40(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit”.

The application for confirmation of the grant in this cause dated 6th September, 2001 was not accompanied by written consent in Form 37 of all dependants or other persons who are beneficially entitled. The interested party and PW2 did not attend court during the confirmation of the grant. PW1 and PW2 testified that they did not give their consent to the mode of distribution and confirmation of the grant. The court record show that only the petitioner was present. I therefore find that the petitioner did not obtain consent of the other beneficiaries as required by the provisions of the Probate and Administration Rules and the temporary grant issued to the late FRANCIS KABURU and confirmed by the court was obtained by making of false statement and concealment from court material facts and by means of untrue allegation of facts essential in point of law to justify the grant and the same ought to be revoked.

The next issue for consideration is who should be the administrator of the deceased estate. There is no dispute that RITHARA ITHAURA died in 1968 and had two wives namely

1. Matera Ritara, 1st wife, mother to Kiriinya father to Francis Kaburu, husband to the respondent and

2. Gakuruga Rithara mother to Mary Gacheri interested party and PW2, Bernard Mbobua.

PW2 stated and I quote:-

“I agree that I and my sister Gacheri should get half of the plot 836 and Francis Kaburu’s family get the other half.”

The respondent equally agree that the household of 2nd wife of the deceased is entitled to ½ of Abothuguchi/Upper-Kaongo/836.

Section 29(a) and (b) of the Law of Succession Act provides:-

29. For the purposes of this Part, “dependant” means-

(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and.....”

From the above Section is clear that both the respondent and the interested party are dependants to the deceased estate. Section 66 of the Law of Succession Act states that the court has final discretion as to the person or persons to whom grant of letters of administration shall, in the best of all concerned be granted. In view of the facts of this case and the conflicting interest of all parties I find that the parties respective interests shall best be served by way of appointing the respondent Charity Kaburu and interested party Mary Gacheri M'rithaa as joint administratixes.

Further the issue for consideration is what assets formed the estate of the deceased RITHARA ITHAURA and how should the estate be distributed. The interested party and her witness averred that the deceased estate comprised of ABOOTHUGUCHI/UPER KAONGO-836 and that during his lifetime he had gifted his son Kiriinya with Abothuguchi/Lower Kaongo/717 a fact that was strongly disputed by the respondent and wife of the late Kirinya, OW2, stated Abothuguchi/Igane/717 was Kiriinya's property which he had brought from a third party. Interested party Exhibit P1 shows that Abothuguchi/Upper Kaongo/836 comprising of 3.2 hectares was first registered in the name of RITHARA ITHAURA and was on 29/1/2003 transferred to FRANCIS KABURU KIRIINYS through LR.NO.19 and L.R 7 by virtue of this Succession Cause. That is confirmed by certificate of search of interested party exhibit P3. Exhibit P2 which is respondent's exhibit confirm Abothuguchi/ Igane/717 comprising 2.0 hectares was first registered in the name of Kirimi Kiriinya and on 4.10.76. there was correction of the name to read Kiriinya Rithara otherwise known as Kirimi Kiriinya. The interested party and her witnesses in their evidence were unable to produce evidence to show that Abothuguchi/Igane/717 was property of the deceased and was gifted to Kiriinya by the deceased. None of the witness was able to state when the land was gifted to Kiriinya and both PW1 and PW2 admitted they did not have any evidence that the land belonged to the deceased herein. The green card shows that the land is in the name of Kirinya Rithara and he was first registered proprietor. The title cannot be challenged in a succession cause and as such I am not inclined to accept the interested party's contention that Abothuguchi/Igane/717 formed part of the deceased estate. On the other hand Abothuguchi/Upper-Kaongo/836 was registered in the name of the deceased. It was even registered 9 years after his death. That if Abothuguchi/Igane/717 was property of the deceased there was nothing stopping those who caused registration of Plot No.Abothuguchi/upper Kaongo/836 from causing registration in respect of Abothuguchi/Igane/717. That it is not in dispute that the respondent and her late husband have been in occupation of Abothuguchi/Upper Kaongo/836 since 1987 and have extensively developed the same and further the land has been shared by elders into two equal portions with clear demarcated boundary. The interested party has stated that the respondent is not entitled to Abothuguchi/Upper Kaongo/836 as their share is on Abothuguchi/Igane/717 whereas PW2 her brother emphatically stated they are entitled to a share. If we were to agree with the interested party then there is the issue as to why the respondent has been on the land for so long without the interested party raising any complaint. Having evaluated the evidence on record it is clear that PW1 and PW2 knew and recognizes that the respondent as having beneficial interest and hence entitled to share the estate. The respondent having been in occupation and possession for many years of Abothuguchi/Upper Kaongo/836 it can only be interfered that the respondent has beneficial interests over the land. The respondent since she settled on the land she has been using the same, her children have grown and married while on that land and has a stone building amongst other developments(see M'INOTI NTHAI V NAOMI KAREGI M'IMAANYARA CA NO.154 OF 2011(Nyeri).

I therefore find the deceased at the time of his death had only one parcel of land Abothuguchi/Upper Kaongo/836. The deceased died in 1968 intestate and before the Law of Succession came into force. The Law of Succession Act came into commencement on 1st July 1981. Section 2(2) of the Law of Succession Act provides:-

“(2) The estates of persons dying before the commencement of this

Act are subject to the written laws and customs applying at the date of

death, but nevertheless the administration of their estates shall commence

or proceed so far as possible in accordance with this Act.”

In view of the above mentioned section the law applicable in the estate of the deceased in this cause is customary law applicable at the date of his death. The deceased was married under customary law to two wives. He had two houses as agreed by all the parties. The deceased was a Mumeru by tribe and was bound by Meru Customary Law. The reinstatement of African Law:- 2 on the Law of Succession by Eugene Cotran on page 35 an intestate Succession:

Distribution of property

Under No.2 Estate of a married man with two or more wives, sons and daughters on land he stated that:-

(i) each house keeps the land which was allocated to it during the husband’s life time

(ii).....

(iii) any uncultivated land belongs to the deceased is divided equally among the houses.”

The evidence on record is that the deceased did not allocate any land to his two houses before he passed on but he left land Abothuguchi/Upper Kaongo/836 in occupation by his two houses and that the clan divided the land equally into two houses. The subdivision was proper and in accordance with the Meru Custom. I find it proper and accept the sub-division as per elders and which parties have acknowledged.

The upshot is that the interested party’s application dated 26th January, 2011 is merited and is allowed. I therefore proceed to make the following orders:-

The temporary grant issued to the late FRANCIS KABURU on 19th February, 2001 and confirmed on 21st January, 2003 be and is hereby revoked.

- 1. The interested party MARY GACHERI M’RITHAA and the respondent CHARITY GACHERI KABURU are appointed joint administrators to the estate of RITHARA ITHAURA(deceased) and temporary grant do issue forthwith to the administratixes.**
- 2. The title Abothuguchi/upper-Kaongo/836 in the name of FRANCIS KABURU(deceased) be and is hereby cancelled and same ordered to revert to the name of RITHARA ITHAURA(deceased).**
- 3. Abothuguchi/Upper Kaongo/836 shall be subdivided into two equal portions as per existing boundaries by the elders.**

- 1. Mary Gacheri M’Rithara**
- 2. Bernard Mbobua on behalf of 2nd house. ½ share**

(b)

**(1)charityGacheri
Kaburu**

(ii) Doreen Gakii

(iii) Harriet Kanana ½ share

(iv) Phineas Gitonga on behalf of

the 1st house.

5. The parties in this matter are aunt and niece. I direct that each bears its own.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE, 2014

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. J. G. Gitonga for the interested party
2. Mrs. Ntarangwi for the respondent

J. A. MAKAU

JUDGE