



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

SUCC CAUSE NO. 51 OF 1998

IN THE MATTER OF THE ESTATE OF RUMURI KIRERI.....DECEASED

LAZARUS MUKINDIA IRERAPETITIONER

JUDGEMENT

1. The Petitioner petitioned for the grant in respect of the deceased estate through a petition filed on 13th March 1998 claiming to be a grandson of the deceased and listed the deceased two daughters Ncurubi Gitumbu (deceased) and Muruga Biriga, as the deceased heirs. The petitioner filed consent to petition for the grant from one Susan Gakii M'Irera his mother and was issued with Temporary Grant of letters of Administration on 6/10/1998 and grant confirmed in his favour on 19th September, 2001 giving all the deceased estate comprising of Nyaki/Thuura/1165 to the petitioner. The applicant/Objector Stephen Kaai through summons for Revocation or Annulment of grant brought under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules sought the said order on the grounds, that the grant was obtained fraudulently by making false statements and concealment of facts material to the case; that the petitioner to whom the grant was issued was a stranger to the family of the deceased and he had impersonated himself as a grandson of the deceased. The Applicant's application was supported by his affidavit sworn on 8th August, 2007 in support of the averments on the face of the summons.
2. The Petitioner on the other hand filed a Replying Affidavit dated 8th June, 2009 averring that the applicant/Objector is not a grandson of the deceased neither is he a relative of the deceased and that it was only his father who was his only heir to the estate of RIMURI KIRERA having been given the land by the deceased during his lifetime. The petitioner further contended that he had lived on the deceased's land and carried out substantial developments and that the applicant /Objector had all that time not raised any claim over the land parcel No. Nyaki/Thuura/1165.
3. That on 29/10/2009 the court gave directions that the summons dated 8th August, 2007 be heard by way of viva voce evidence. The Applicant/Objector gave evidence in support of his claim and called two witnesses, whereas the petitioner gave evidence and called three witnesses.
4. The applicant's/Objector's case through PW 1, PW 2, and PW 3 is that the petitioner stole the

Applicant's land Nyaki/Thuura/1165, registered in the name of the deceased RUMURI KIRERI a relative of PW 1 and father to PW 2 Rebecca Muruga. PW 1 averred that the deceased was his relative and his grandfather as he had been left under care of PW 2 by the deceased. PW 1, PW 2 and PW 3 averred that the Objector was not related to the deceased at all but was a total stranger to the deceased estate. PW 1 testified that the deceased had left his land to his father and PW 2 told him the land was his.

5. PW 2 testified that she is the only surviving daughter of the deceased and that she did not know the petitioner as he is not their relative. That the petitioner filed the petition without her knowledge and consent and that the person who gave the consent one Susan Gakii M'Irera is unknown to her. She however stated PW 1 is known to her as her relative and all are connected by Kireri her grandfather. PW 2 testified that she is the one who is entitled to inherit her father's land which she would subdivide and give the Applicant/Objector part of it. PW 3 a neighbour to the deceased and who knew the deceased herein as well as his land testified that PW 2 was a child of the deceased. The Applicant/Objector is relative of the deceased and the two were connected at Kireri as Applicant's/Objector's father was grandson of Kireri who was father to the deceased. PW 3 testified that upon death of RUMURI KIRERI his land Nyaki/Thuura/1165 was left to M'ARITHO M'MUKINDIA father to the Applicant/Objector who had used the land before he shifted to Kiburine.
6. The Petitioner gave evidence as DW 1 and on his part averred that the land belonged to his father, the deceased, who had been adopted by RUMURI KIRERI as a relative having come from the same family line. That his father M'Irera was living on the deceased's land and the petitioner was born on the said land. That the DW1'S father went to live on the said land and cared for the same including paying rates to Municipality. He produced chief's letter given to his father to petition for the grant, which letter the court noted had been interfered with by crossing out parts of the original letter and that the photocopy had a gap. DW 1 admitted that he did not have a consent from PW 2 who he acknowledged to be a real daughter of the deceased but he got a consent from his mother who is not a dependant or a relative of the deceased. During cross-examination DW 1 testified that he petitioned for the grant as a grandson of M'RUMURI because his father had been adopted by M'RUMURI, however he admitted he was not at the adoption ceremony. He contended that is how he acquired his relationship with M'RUMURI KIRERI and became his grandson. DW 1 further testified that he did not seek PW 2's consent but only informed her of the petition in 1998, neither did he seek and obtain written consent from the closest family members of the deceased but he got consent from his mother who he purported was related to the deceased through adoption of his father. DW 1 on being pursued to explain the lineage of applicant/Objector and that of his father he was unable to do so, neither could he connect his family lineage with that of the deceased M'RUMURI KIRERI. He averred that PW 2 Muruga daughter of the deceased is not entitled to deceased estate because she had not applied to be catered for, though entitled to her father's estate. DW 1 averred that he claiming the deceased land as a son of his father.
7. DW 2 testified that he was subarea in charge of Nkandomo and knew M'RERA father to the petitioner Lazarus Mukindia and PW 2 as daughter to the deceased. He averred that one time M'RERA slaughtered a goat for the deceased to signify M'RERA is deceased's heir in his presence in company of Stephen Gachiata also subarea of Abonyai village having been send there by chief as a witness. He averred that the goat was slaughtered meaning it was a gesture of appreciation of giving M'RERA soil and authority to receive dowry of the deceased daughters. That after death of M'RUMURI KIRERA, M'RERA buried him in presence of DW 2 and Stephen Gachiata and that one M'ARITHO was not at the burial. During cross examination DW2 testified that when one is giving land is required to get witnesses. DW 2 stated that he did not know the lineage of the petitioner's father and that of the deceased. He stated at the slaughtering of the goat there were two subareas, deceased M'rera, all in all were 4 in number, However on being pressed further he stated brother of the deceased M'Thanga was present and changed the number of people present to five. He testified the children of the deceased were not present and one cannot give land in absence of his children as per Kimeru custom, however in their absence reason is supposed to be offered by the donor.

8. DW 3 testified that his name is Stephen M”Murimara from Thuura and a farmer who knew the deceased, the father of PW 2. He testified he knew the Applicant/Objector. He testified Applicant’s father never lived at Rumuri’s land but the father of the petitioner lived with the Rumuri Kireri who was buried on disputed land. He averred the deceased and father of the petitioner were members of one family and living on one compound with different houses. He testified that Rumuri gave his land to the father of the petitioner because his daughters were small in 1990’s and he witnessed the giving of the land and the slaughtering of a goat in which DW 3 averred the deceased said, that he had given his land to the father of the petitioner and requested him to care for his daughters and by which time PW 2 had been married. He averred Rumuri was buried at that land by the petitioner’s father and by that act, he testified the petitioner’s father became a child to the deceased. He averred on the disputed land there are homes and trees of the petitioner and averred the land belonged to the father of the petitioner. During cross examination DW 3 testified that at the ceremony of giving the land to petitioner’s father there were 4 Njuri Ncheke people, himself, Rimuri and all were 7 in number. He also admitted that he did know the deceased lineage and that he did not know his father. He also testified he does not know the Applicant/Objector lineage and that he did not know the relationship between Rimuri and the applicant/Objector. He said the goat was slaughtered between 1960’s and 1970’s. He also admitted that the petitioner’s father has a land of 4 ½ acres adjoining that of Rimuri Kirera. He concluded by saying that he was not aware whether the petitioner had consent from PW 2 to petition for grant of letters of administration
9. I have taken pain to reproduce as much as I could all the relevant evidence by both the applicant and petitioner and that of their respective witnesses. I have very carefully considered the pleadings, the proceedings, and oral submissions by both Counsel in respect of their opposing positions. The issues for determination in this cause can be summarized as follows:-
- a. *Whether the grant herein was obtained fraudulently by making of a false statement and concealments of fact material of the cause herein.*
 - b. *Whether the petitioner is stranger to the family of the deceased RIMURI KIRERI?*
 - c. *Whether this grant should be revoked or annulled and if so who should be appointed the administrator?*
10. In Succession matters before a party can petition for grant to issue he is required to give notice to all beneficiaries as per Rule 26 (1) of the Probate and Administration Rules which 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.

An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

11. That upon issuance of temporary Grant to a Petitioner before confirmation of the grant the petitioner is required by virtue of Rule 40 (8) of the Probate and Administration Rules to have consent from all beneficiaries on the mode of distribution and to the confirmation of the grant.
- 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”.

12. In the instant cause PW 2 daughter of the deceased who ranks in priority to the petitioner who referred to himself as grandson of the deceased by virtue of his father’s purported adoption by the deceased admitted that PW 2 did not give him any consent in writing. PW 2 was emphatic that no consent was sought from her and she did not give any. PW 1 similarly denied giving consent. DW 1 stated that his own mother who he claimed was related to the deceased by virtue of adoption by her husband purportedly gave consent to the petitioner.
13. The petitioner claimed that his father was adopted by the deceased under Kimeru customary law. He was not at the adoption ceremony and that his evidence is hearsay. He alleged that the adoption was in 1968 when his father slaughtered a goat to the deceased and that there was nothing recorded in the giving of the land. The petitioner who by then was 12 years old did not attend the ceremony. DW 2 averred that he was sent by chief. to witness what M’Rera was saying and went with Stephen Gachiata both of whom were subareas. He stated that M’Rera told them he wanted them to witness the slaughtering of the goat, which was slaughtered meaning it was a gesture of appreciation of giving M’Rera soil and authority of M’Rera to received dowry of the deceased daughter. DW 2 stated in the ceremony there was two sub areas, deceased and M’rera, but on being pressed further he changed the number from 4 to 5. He further stated that under Kimeru customary law one cannot give land without involving his children otherwise one has to give an explanation. In this case the deceased’s children were absent and no explanation was given of their absence . DW2 was very specific that according to him that the deceased did not say anything about the alleged slaughtering of the goat but he stated according to him the slaughtering of the goat meant that it was a gesture of appreciation of giving M’Reria soil and authority to receive dowry of the deceased daughters. DW 3 who purported to have been at the slaughtering of the goat ceremony and giving land to the petitioner contradicted DW2 in all material facts. He stated the deceased gave his land to the petitioner’s father because his daughters were small and that it was in 1990’s He also contradicted himself on the year by stating that it was in 1960’s and 1970’s . He further contradicted DW2 by stating that the deceased said he had given his land to the father of the petitioner and requested him to care for his daughters, and by that act the petitioner’s father became a son to the deceased. DW 3 did not mention the deceased’s acts were in accordance with Kimeru customary law. DW 3 did not mention that DW2 was present nor did he mention presence of 2 subareas as alleged by DW 2. He further contradicted DW 2 by stating that there were 4 Njuri Ncheke people who DW 2 did not mention. He stated that at the ceremony there were 7 people.
14. I do in view of such serious inconsistencies and contradictions between DW 2’s and DW 3’s evidence find that there was no ceremony carried out in which a goat was slaughtered for the deceased and in which he gave his land to the father of the petitioner in absence of his children and close family members.
15. Further I find that the petitioner had failed to call a Meru customary expert to prove that the custom of adoption and that his father was adopted by the deceased and was entitled to his land in exclusion of the children of the deceased who included PW 2 and their closest family members of the deceased by virtue of slaughtering a goat for the deceased.. That if such custom would have been proved then this court would have gone on to find out whether such custom which would deprive the dependants the right to the property would be repugnant to justice and morality and since such custom has not been proved as required I do not find it necessary to deal with the said issue. I further find therefore and hold that the Petitioner failed also to prove Kimeru customary law of adoption in favour of the adoption of his father and the petitioner’s assertions that he is a grandson of the deceased through adoption of his father by the deceased through Kimeru customary law is without any basis and the same is rejected
16. I have perused the petition for the grant of letters of Administration and the petitioner’s form P & A 5 in which he described himself as a grandson. The evidence of the applicant and his witnesses

as well as that of the petitioner and his witnesses DW 2 and DW 3 points to one direction, that is the relationship between the petitioner and the deceased if any is a distance one and he was not a dependant of the deceased as per provisions of **Section 29(a) of the Law of Succession Act** which provides:-

“29 For the purposes of this part “dependent” 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,”

17. In view of the above I have no hesitation in stating that the grant in this cause was obtained fraudulently by making of a false statement and concealment of facts material to the making of the grant.

18. I further in view of my findings that there is no relationship between the deceased and father of the petitioner and that there was no adoption under Kimeru custom or any adoption under any other known law, I am bound to hold that the petitioner is a stranger to the family of the deceased Rumuri Kirere.

19. I also in view of Section 76 the Law of succession Act which provides:-

“76. 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 “

find that as the grant was obtained fraudulently with intention to deprive the rightful heirs to the deceased estate who includes the Applicant/Objector and PW 2, and as such the same ought to be revoked and by virtue of **Section 66 of the Law of Succession Act** on Administrator be appointed.

20. I therefore allow the application dated 8th August, 2007 and order as follows:

1. ***Letters of Administration made to one Lazarus Mukindia issued on 6th day of October 1998 and confirmed on 19th September, 2001 be and are hereby revoked.***
2. ***Stephen Kaai and Rebecca Muruga are appointed joint administrators and Administratrix respectively of the estate of Rumuri Kireri and temporary grant of letters of Administration (P & A 41) do forthwith issue to the two administrators.***
3. ***Title no NYAKI/THUURA/1165 transferred to Lazarus Mukindia Irera by virtue of the revoked grant is cancelled and the said Title No. NYAKI/THUURA/1165 do revert back into the name of the deceased RUMURI KIRERI.***
4. ***The appointed Administrator and Administratrix do file an application for confirmation of the grant within 60 days from today.***
5. ***Costs of this cause to the Applicant/Objector,***

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. G. Anampiu for applicant/objector

2. Mrs. Ntarangwi for the petitioner.

J.A. MAKAU

JUDGE