



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
SUCCESSION CAUSE NO. 2337 OF 2000
IN THE ESTATE OF MBUGUA NACHU – DECEASED

RULING

1. These proceedings relate to the estate of Mbugua Nachu, who died on 12th December 1971.
2. According to the Chief of Ngecha Location, Limuru, dated 8th February 1999, he was survived by three daughters – Mary Wambui Ng’ang’a, Mary Nyambura Mburu and Hannah Nduta Ndung’u. The three filed a petition on 25th February 1999 in **Kiambu Senior Principal Magistrate’s Court Succession Cause No. 83 of 1999** for a grant of letters of administration intestate in respect of his estate. The petition lists the three as his only survivors and describe them as daughters of the deceased. He is expressed to have died possessed of Limuru/Ngecha/648. A grant to that effect was made to the three on 13th April 1999.
3. On 22nd November 1999 two of the administrators, Mary Wambui Ng’ang’a and Hannah Nduta Ndungu, filed a summons for the confirmation of the grant. In their affidavit sworn on 22nd November 1999, they averred that their sister and co-administrator, Mary Nyambura Mburu, had refused to cooperate with them. They proposed equal distribution of the property equally between all three of them. The application dated 22nd November 1999 was allowed on 24th January 2000 and a certificate of confirmation of grant was issued accordingly, confirming distribution of Limuru/Ngecha/648 equally between the three daughters.
4. The matter was thereafter placed before the Resident Magistrate on 29th May 2000, who advised the parties to refer the matter to the Land Disputes Tribunal.
5. There are on record proceedings of the Land Disputes Tribunal. They were filed in Kiambu **SPMCSC No. 83 of 1999**. It is recorded that Mary Nyambura Mburu did not cooperate with the Tribunal. The Tribunal its verdict on 25th July 2000, sharing out the said property equally between the three survivors of the deceased – Mary Wambui Ng’ang’a, Mary Nyambura Mburu and Hannah Nduta Ndung’u.
6. The cause before me was opened in 2000 after Mary Nyambura Mburu successfully moved the High Court by **HC Misc. Succession Application – No 772 of 2000** for the transfer of the Kiambu cause to the High Court. The order was granted on 13th October 2000 and the file in **Kiambu SPMSC No. 83 of 1999** was transferred to the High Court.
7. Thereafter two applications were filed at the High Court on 11th December 2000 and 6th February 2001 seeking the confirmation of the award of the Land District Tribunal dated 25th July 2000.

The award of the Tribunal was read to the parties on 3rd April 2001 by the Deputy Registrar. This prompted Mary Nyambura Mburu to move the court the same day for the setting aside of the said award. The application dated 3rd April 2001 objecting to the award was dismissed on 26th February 2002 by Aluoch J, and the parties were advised to move instead for revocation of the grant made in **Kiambu SPM CSC No. 83 of 1999**. Aluoch J. also held that the procedure adopted by the court in Kiambu **SPMCSC No. 83 of 1999** was wrong and dismissed any order referring the matter to the elders.

8. It is against this background that the application dated 1st March 2002 was filed by Mary Nyambura Mburu. It is this application that I am tasked with determining.
9. The application dated 1st March 2002 seeks revocation of the grant made on 13th April 1999 in **Kiambu SPM CSC No. 83 of 1999**. The applicant states that she is a daughter-in-law of the deceased who died in 1971. She avers that her husband died before the filing of **Kiambu SPM CSC No. 83 of 1999**. She alleges that she lives on the only asset of the estate, Limuru/Kamirithu/648, and that the other administrators, who are daughters of the deceased, do not for they are married. She states that she did not consent to the reference of the matter to the Land Disputes Tribunal. She states that the procedure adopted of referring the matter to the Tribunal was wrong.
10. The reply to the summons dated 1st March 2002 is by Mary Wambui Ng'ang'a through her affidavit sworn on 4th June 2002. The affidavit was purportedly sworn with the authority of the other respondent, Hannah Nduta Ndung'u. She states that the applicant was party to the making of the grant in Kiambu **SPM CSC No. 83 of 1999** as she had consented to it. She takes the position that the application dated 1st March 2002 is defective for the applicant is one of the administrators appointed in **Kiambu SPM CSC No. 88 of 1999**. She says that the grant was confirmed on 24th January 2000 and the estate was shared equally. She avers that the distribution of the estate was determined by the court and not the elders. She also states the value of the estate to be no more than Kshs.80,000.00. She alleges that she and her co-respondent have also been in occupation of the subject land. She further states that the land in question was subdivided by the deceased before he died.
11. The applicant swore a further affidavit on 10th June 2002. She states that the grant in question was obtained on a false statement, that she was a daughter instead of a daughter-in-law of the deceased. She further states that there was a decision by the elders distributing the property equally between the three daughters of the deceased, which did not take into account the fact that the deceased was survived by a son. She contests that allegation that there was *inter vivos* distribution in her favour and that of the respondents. She asserts that the respondents are married women.
12. It was directed on 15th October 2008 and 3rd December 2008 that the parties do file and serve witness statements. It was also directed that the matter do proceed by way of cross-examination.
13. Two witnesses statements were filed to support the applicant's case by Gikonyo Wainaina and Waithaka Njuguna. One claims to be a relative of the deceased, while the other is a neighbor. The relative, Waithaka Njuguna, states that the respondents are married and live with their husbands. They never lived on the land in question before their father died, and that they only moved in forcefully after his death. He states that the land had been given to their late brother, the dead husband of Mary Nyambura Mburu. Under customary law the married daughters are not entitled to a share of their father's estate. This is confirmed by Gikonyo Wainaina.
14. On 24th June 2009 it was directed that written submissions be filed on the said application. I have on record submissions dated 28th July 2009 filed by the applicant. The matter came up for the highlighting of the submissions but this did not come to pass. It was directed on 28th May 2014

that the matter be decided on the basis of the papers already on record.

15. The deceased died in 1971. This was before Law of Succession Act came into force in 1981. The application of the Law of Succession Act is stated in Section 2. The relevant provisions are subsections (1) and (2) of the said section. Section 2(1)(2) states as follows:-

“2(1). Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration estates of those persons.

(2) The estate 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 estate shall commence or proceed so far as possible in accordance with this Act.”

16. The deceased, from the material before me, died intestate. The intestacy provisions in the Law of Succession Act are to be found in Part V of the Act. According to Section 1 2(1) the Law of Succession Act applies to estates of persons who died after it came into force. The commencement date of the Act is 1st July 1981. As the deceased died in 1971, the Act does not apply to his estate. The effect of this is that, the intestacy provisions do not apply to the estate of the deceased. The applicable law according to Section 2(2) of the Act should be the written laws and customs that applied at the time of his death. The deceased was a resident of Kamirithu, Limuru which is within the Kikuyu country. From his name it is obvious that he was Kikuyu by ethnicity, and therefore subject to Kikuyu customary law. His intestate estate should therefore be dealt with in accordance with the Kikuyu customs that governed such estates.

17. According to Section 2(2) of the Act, the provisions of the Law of Succession Act on administration of estates are applicable to all estates, including of the persons who died before 1st July 1981. Part VII of the Act covers administration of estates, and it covers, among others, the process of obtaining grants, their confirmation and revocation.

18. The process for obtaining the grant in respect of the estate of the deceased in this cause is subject to Part VII of the Act, equally so the revocation thereof. The applicant has come to court by her application dated 1st March 2001 asking that the grant made in **Kiambu SPM CSC No. 83 of 1999** be revoked. The application does not cite the provisions of the Law of Succession Act under which it is premised, but there is a citation of rule 44.

19. Grants made under the Law of Succession Act are revocable under Section 76 of the Act. The provisions envisages five grounds upon which revocation may be ordered:-

- a. the process of obtaining grant being defective;
- b. the process of obtaining grant being attended by fraud and concealment of matter;
- c. the process of obtaining grant being attended by falsity;
- d. problems with administration - confirmation not being sought on time or failing to proceed diligently or failure to account when called upon to; and
- e. grant becoming useless or inoperative.

20. The first three can be collapsed into one ground – problems with the process of obtaining the grant, meaning therefore that there are three key grounds upon which a grant may be revoked – problems with the process of obtaining grant, problems with administration and grant becoming useless or inoperative.

21. The applicant’s application is grounded, apparently, on two grounds – that the process of obtaining the grant was defective and that the process of distribution was affected by wrong

procedures. On the defects in the process of obtaining grant, she says that she was described as daughter in the petition instead of being described as a daughter-in-law. The correct description is of consequence. Under Kikuyu customary law, inheritance is patrilineal. It is the male relatives of the deceased who have priority. The sons take priority over the daughters, on the understanding that the daughters may marry and access property elsewhere through their husbands. Unmarried daughters through may be provided for. Where there is no son, the daughters would take the property exclusively, if they are unmarried.

22. In the instant case, the petition disclosed the three alleged survivors of the deceased as daughters. Their marital status is not mentioned contrary to rule (1) (e) (i) of the Probate and Administration Rules. In all the affidavits filed by the respondents, I do note that they have not disclosed their marital status, yet the same was critical given that the deceased died before the Act came into force and customary law governed the estate of the deceased, under which law married daughters do not have a stake in their parent's estate. The material before me reveals that the respondents are married and did not live on the land in question. It also emerges that the applicant is the widow of a son of the deceased. It is the son who is entitled under customary law as against the married daughters. The descriptions of all three women as daughters is misleading. It created a defect in the process. It amounted to a falsity and concealment of matter from the court.

23. The applicant argues that the value of the estate exceeded the Kshs.80,000.00 stated in the petition. Under *Section 48(1)* of the Act, a resident magistrate who has been granted jurisdiction under *Section 47* of the Act can entertain a petition on the estate of a deceased person only if the value of the estate does not exceed Kshs.100,000.00. If the value exceeds that figure, the lower court would have no jurisdiction and the proceedings to obtain the grant from that court would be defective. No valuation has been placed before me to show me that the value of six (6) acres situate at Limuru, Kiambu County, was Kshs.80,000.00 in 1999. It is a matter upon which I can only speculate. I am not prepared to take judicial notice of the value of the property at the time without a valuation, although I can take judicial notice of the values today.

24. On the issue of the matter of the distribution of the estate being referred to elders, I take the view that the same is of little relevance. The reference to the elders was made after the grant had been confirmed, detailing how the estate was to be distributed. It is not clear what the court sought to achieve by making the reference to the Tribunal, for there is no provision for it under the succession legislation.

25. In view of what I have stated above, I will make the following orders:-

- a. That the grant made on 13th April 1999 is hereby revoked;
- b. That the applicant and one of her children shall make an application in this cause for a fresh grant;
- c. That the certificate of confirmation of grant dated 24th January 2000 is hereby cancelled; and
- d. That costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 11th DAY OF December 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Moses for the applicant

In the presence of Mr. Wangaha for the respondent.