



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2299 OF 2003

IN THE MATTER OF THE ESTATE OF KINYAGA MUROKI – (DECEASED)

RULING

1. The deceased herein, Kinyaga Muroki, died on 31st October 1992. Representation to his estate was sought by John Michael Gichuhi, his brother, by a petition filed herein on 16th August 1993. The petitioner described himself as the sole survivor of the deceased. The deceased was expressed to have died possessed of a property known as Githunguri/Ikinu/304. A grant of letters of administration intestate was duly made on 23rd December 1993.
2. The grant was confirmed on 7th July 1995. The orders were made on an application dated 16th November 1994. Although the application on its face purports to be supported by the affidavit of the administrator, John Michael Gichuhi, the affidavit attached to it is infact sworn a Lucy Wanja. It was ordered that the estate be shared equally between the administrator and the said Lucy Wanja. This is a little curious. For one, an application for confirmation can only be moved by the holder of the grant. This is clear from the language of *Section 71* of the Law of Succession Act and Rule 40 of the Probate and Administration Rules. The affidavit supporting the application for confirmation can only be sworn by the holder of the grant. Secondly, the petition filed on 16th August 1993 listed only one survivor, John Michael Gichuhi. It is not clear who Lucy Wanja is to the deceased and how she came to be listed at the confirmation of the grant as an heir.
3. Curiously the said Lucy Wanja swore several other affidavits in support of applications dated 28th March 1996 23rd November 1998 and 14th March 2000 seeking certain orders authorizing the registrar of the court and the Land Registrar combined to sign certain documents. All these applications were granted despite being filed by a person other than the holder of the grant.
4. On 14th November 2000 a summons for the revocation of the grant made on 23rd December 1993 was filed in court. It was alleged that the grant was obtained fraudtently and through a defective process. It was claimed that the deceased had left a valid will, was married and had a child. It was alleged that this information was concealed from the court. Copies of the alleged will and the birth certificate of the alleged child are attached to the affidavit sworn in support of the application.
5. The application was allowed on 10th April 2002. The grant made on 23rd December 1993 and confirmed on 16th August 1995 was revoked.
6. On 9th January 2004, John Michael Gichuhi filed a summons general seeking the setting aside of the orders made on 9th January 2004. He argues that the application dated 14th November 2000 was not

served on them. He would like the orders vacated and for leave to reply to the said application. The application is still pending. It was last in court on 11th May 2004.

7. Another cause relating to the same estate was commenced on 19th August 2003. This was at the instance of Muroki Kinyaga, who describes herself in the petition as a son of the deceased. He lists herself and his mother, Joyce Njoki Kinyaga, as the sole survivors of the deceased. He expresses the deceased to have died possessed of Githunguri/Ikinu/304. A grant was made in this cause on 9th October 2003.

8. On 27th January 2004 a summons was filed seeking revocation of the grant made in the cause in **HCSC 2299 of 2003** on 9th October 2003. Of note is the fact that the summons dated 27th January 2004 is neither signed by the applicant, John Michael Gichuhi, nor by his lawyers, Messrs. Kaburu Miriti & Co. Advocates. The applicant alleges that the grant was obtained fraudulently and by misrepresentation. The details of the fraud and misrepresentation are set out in the applicant's affidavit sworn on 27th January 2004. He asserts that the deceased never married and had no children contrary to what was alleged in the petition. The property he died possessed of was alleged to be family property which he was holding in trust.

10. The reply to the application is by Joyce Njoki Kinyaga, the mother of the administrator and the alleged widow of the deceased. She swore an affidavit on 12th August 2014 asserting that she had married the deceased in 1978, they got one child, the administrator herein, in 1984, they separated and the deceased was left with the child with whom he lived until he died.

11. The administrator swore his own affidavit on 12th August 2004. He asserts that he lived with the deceased on the latter's land until he died. He states that he lived together with his parents until they separated in 1992 when he chose to remain with his father.

12. The applicant responded to these replies by swearing an affidavit on 7th December 2004. He mainly denies that the deceased was ever married and had children and that the administrator ever lived on the subject land.

13. On record are several affidavits sworn by the persons designated to be called at witnesses. There are also other documents headed "*witness statements.*" These were filed pursuant to directions given on 13th October 2008 by Onyancha J.

14. There is also on record a preliminary objection filed on 2nd April 2014 by Messrs. Kitheka & Co. Advocates for the administrator. He argues that the matter is *res judicata* in view of the proceedings in **HCSC No. 1102 of 1993** and therefore this court is *functus officio*. I note that Messrs. Kitheka & Co. Advocates acted for the administrator in **HCSC No. 1102 of 1993** knowing that cause existed, yet the advocates proceeded to file the cause in **HCSC No. 2299 of 2003**. **HCSC No. 1102 of 1993** came first. Ideally, **HCSC No. 2299 of 2003** ought not to have been filed. There can be no merit in the preliminary objection.

15. What I am called upon to determine here is the summons for revocation of grant dated 27th January 2004. As indicated above the application dated 27th January 2004 is not signed by the applicant nor his counsel. It is therefore incompetent. There is no application before me for determination.

16. After taking everything into account and for the purpose of moving the matter forward, I will make the following orders:-

(a) That **HCSC No. 1102 of 1993** and **HCSC No. 2299 of 2003** are hereby consolidated;

(b) That the lead file shall be HCSC No. 2299 of 2003, as the grant is **HCSC No. 1102 of 1993** was revoked in 2002;

(c) That the undated summons general filed in **HCSC No. 1102 of 1993** on 9th January 2004 is hereby dismissed for want of prosecution;

(d) That the Summons for Revocation of grant dated 27th January 2004 filed in **HCSC No. 2299 of 2003** is hereby struck out for want of execution by the applicant or his counsel;

(e) That there shall be no order as to costs.

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

W. MUSYOKA

JUDGE

In the presence of Mr. Kagwe advocate for the respondent.

No appearance of the advocate for the applicant.