



REPUBLIC OF KENYA

High Court at Embu

Miscellaneous Application 82 of 2008

IN THE MATTER OF THE ESTATE OF REAH WANJUE MURATHI – DSD

WILSON NJERU NJAGI APPLICANT

VERSUS

KIARAGO RIMUNYA RESPONDENT

RULING

The application herein is the summons for revocation or annulment of grant under section 76 Law of Succession Act and rule 44(1) P&A Rules. It's premised on the following grounds;

- a) The proceedings to obtain grant were defective and not accompanied by affidavit of consent or waiver by persons entitled to apply.***
- b) Neither the Respondent herein nor George Gicovi Gatumu are entitled to inherit part of parcel No.Gaturi/ Nembure/ 4323.***

It also supported by the affidavit of the Applicant Wilson Njeru Njagi. In it he explains how the succession Cause No.54/07 Runyenjes was filed and a grant finally issued to the Applicant. The same was confirmed and the land No.Gaturi/Nembure /4223 distributed yet it was his property, his grandmother having had a life interest in it. The Respondent filed a replying affidavit and said the Applicant was neither a son or beneficiary/dependant of the deceased. He further avers that the Applicant was fully aware of the filing of the Succession Cause. The deceased was survived by one son and three daughters. The matter proceeded by way of *viva voce* evidence. The Applicant in his evidence stated that the deceased was his paternal grandmother. The Respondent is his paternal uncle. The deceased and Applicant were registered as joint owners of land No.Gaturi/Nembure/4323. Their shares were half by half. He says infact the whole land was his. The Respondent has his own land Gaturi/Nembure/1023 (PEXB1) measuring four (4) acres. He is therefore not entitled to family land. The original title deed of the land in question is with him. And George Gichovi who has been given a share of his grandmother's estate is not known to him. And the Respondent's sisters are married and do not need the land. His father Njage Limunya was a brother to the Respondent. He died when the Applicant was still young.

PW2 a cousin to the Respondent testified that he registered the land in the joint names of the deceased and the Applicant. The reason being that the Applicant's father had no land and that those were the deceased's instructions. He has the title of land number Gaturi/Nembure/4323 in his custody. He denied indicating any shares when he registered the land. He also denied any knowledge of the land being jointly owned in half shares. The reason for registering it in two names was to stop the Applicant from chasing away the deceased.

The Respondent in his defence stated that he followed all the laid down procedures in obtaining the grant. And that the Applicant was fully aware of this as they had all appeared before the chief before filing the succession cause. He indicated that he was only distributing his mother's estate of 1½ acres. Gichovi benefited as he is the one that provided the funds for the Succession Cause. DW2 is a sister to the Respondent. She gave evidence similar to that of the Respondent (DW1). The assistant chief (DW3) testified that on 22/4/2007, the Applicant, Respondent and his sisters came to his office and told him about their desire to file a succession cause in respect of the deceased. The Applicant gave the Respondent the burial permit. The Applicant indicated that as long as his share was not affected he had no problem. He sent them to the chief who later issued them with a letter. The Applicant refused to release the title deed when it was demanded for. In cross-examination he said the Respondent has another land.

Both Counsels agreed to file written submissions which they did. Each has expounded on the issues raised in the affidavits by the parties and their evidence in Court. The undisputed facts are as follows;

I) The Applicant is a paternal grandson to the deceased

ii) The Respondent is a son to the deceased

iii) The Respondent is the registered owner of land No.Gaturi/Nembure/1023.

iv) The land Gaturi/Nembure/4323 was registered in the joint names of the deceased and Applicant in ½ shares.

v) Upon confirmation of grant the ½ share of the deceased in land No.Gaturi/Nembure/4323 measuring 1½ acres was distributed to the Respondent (one acre) and one Gicovi (½ acre).

Issues for determination are;

1. Whether the deceased held the ½ share in land No.Gaturi/Nembure/4323 in trust for the Applicant. If the answer is “YES” then the land should be inherited by him. If the answer is “NO” then the next issue to determine is

2. Whether the Applicant was a beneficiary/dependant of the deceased. If the answer is “NO” then his consent was not necessary. But if the answer is “YES’ then his consent and participation was necessary.

The Applicant and PW2 have told this Court that the land Gaturi/Nembure/4323 was registered in the joint names of deceased and the Applicant. This was to ensure that the latter did not chase away the former. Infact PW2 states that it is him who registered this land. A look at the copy of register (PEXB2) shows that the original proprietor was one MARY WARUE MWARIRIE and had been registered on 22/11/1984. Ownership was transferred to the deceased and the Applicant on 9/1/1985 in equal shares. The column for consideration indicates what was paid as shs.5000/=. Secondly its clear that this land was not inherited by the deceased from her husband, for it to be called family land.

My finding therefore is that the deceased bought this land from Mary Warue Mwaririe for a price, which is indicated as shs.5000/=. Did she therefore hold this land in trust for the Applicant? PW2 who claims to have been the one who registered the land and even had custody of the title deed appeared surprised that the land was registered in the joint names of the deceased and Applicant, in half shares. If what he told the Court was his intention what was so difficult to have the deceased registered but holding the land in trust for the Applicant?

M/s Ndorongo submitted that PW2 while effecting registration did not distinguish between owners in common and joint owners, to him the two terms mean the same thing and are used interchangeably. If the registration was meant to shelter the deceased it could not have required her getting ½ share. Even 1/8 share would have served the purpose. Had PW2 told the Lands office what he has told the Court that office would have clearly noted in the register that the deceased was holding the land in trust for the

Applicant. That was not done.

My finding therefore is that the deceased did not hold her ½ share in trust for the Applicant. It was therefore to be subjected to succession.

That brings me to the 2nd issue. Who is a dependant? Section 29 of the Law of Succession Act defines a dependant as;

- 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.***

From the evidence adduced its not disputed that the Applicant is a grandson (paternal) of the deceased. It is also true that he was taking care of the deceased. DW2 the (assistant chief) told the Court that the deceased and Applicant lived together. He is also the one who had possession of the burial permit of the deceased, together with the title deed of the land in issue. The simple question would be why the Applicant and not the Respondent would have these important documents.

After considering all this evidence I do find that the Applicant though a grandson must have had a special place in the life of the deceased, and she had taken him in as her own. He therefore falls under the description of dependant under section 29(b) of the Law of Succession Act. He ought therefore to be considered as a beneficiary.

There is another person called George Gicovi who was given an inheritance of ½ acre. DW1 and DW2 claim he is a grandson of the deceased but do not say how that relationship comes about. And if indeed he funded the filing of the Succession Cause there is nothing to confirm that kind of arrangement. The evidence of DW1 and DW2 is abit shaky on this and my finding is that the witnesses were not truthful on this. It is also not clear how many children were left behind by the deceased. DW1 states that she is survived by two (2) sons and three (3) daughters. He further says he went to the chief with Njogu, his sisters and the Applicant to discuss the issues of succession. DW2 also states that the deceased left two (2) sons and three (3) daughters. The sons are the Respondent and Njogu. Form 38 in the Runyenjes Succession Cause only obtained consent of four (4) persons. Njogu's consent was not obtained. Where is he? Even form P&A5 which is the affidavit in support of the petition only lists the Respondent and three (3) sisters as the people surviving the deceased. Where is Njogu? And if the chief's letter dated 25/6/2007 is anything to go by then there is another beneficiary called Tabitha Marigu Gachogo who by agreement was to get the deceased's half share. She too has not been considered. It is therefore in the interest of justice that the deceased's estate be re-distributed afresh, in order to cater for the interests of all the beneficiaries.

I have noted from documents produced herein that following the grant in the Runyenjes Court the estate was distributed and even transfers effected. The said estate must be protected by this Court. Orders will be issued for that protection.

The result is that;

- 1. The grant confirmed on 13/3/2008 is revoked. A fresh grant will be issued by this Court in the 1st Respondent's name.***
- 2. The Respondent to file a fresh summons for confirmation which must include all beneficiaries as indicated by the Court.***
- 3. An inhibition under section 68 of the Land Registration Act to be registered against the title number Gaturi/Nembure/4323 until further orders of this Court.***

4. Each party to bear his own costs.

Right of appeal explained.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT EMBU THIS 16TH DAY OF MAY
2013**

**H.I. ONG'UDI
J U D G E**

In the presence of;
M/s Muthoni for Ithiga for Respondent
Applicant
Respondent
Njue – C/c