



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 271 OF 2005

IN THE MATTER OF THE ESTATE OF PIUS GACHOKI MUCHIRA

WILLIAM NJOGU GACOKI..... PETITIONER/APPLICANT

VERSUS

SYMON MUCHIRI GACHOKI..... RESPONDENT

RULING

This is the application for revocation of grant dated 3rd July 2008. Its brought under Section 42 and 76 of the Law of Succession Act, Rule 44(1) of the Probate and Administration Rules. The following are the grounds:-

- (a) The grant was confirmed fraudulently by making of a false statement and the concealment from court of some material facts relevant to the cause.***
- (b) The grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant.***
- (c) The proceedings to confirm the grant were defective in substance.***

It was supported by the affidavit of the Applicant who was one of the administrators. He is basically complaining about distribution of the estate of the deceased. He depones that their father had distributed the land prior to his death. The respondent opposed the application through his long replying affidavit.

The matter proceeded by way of viva voce evidence. The Applicant called 2 witnesses. Their proposal is that the estate be distributed according to sons in each house. The respondent called 2 witnesses. He is in agreement with the confirmed grant.

The undisputed facts are:-

- 1. The deceased was a polygamist with 2 wives.***
- 2. 1st house has 2 sons and 3 daughters (5 children)***

3. *2nd house has 1 son and 4 daughters (5 children)*
4. *The estate comprises of 2 parcels of land, viz*

(i) L.R. Gichugu/Settlement/511

(ii) L.R. Gichugu/Settlement/884

5. *The deceased died on 21/3/2004 intestate and so his estate is subject to the law of succession.*
6. *What the Applicant referred to as a WILL were just some notes which are not agreed upon in any event no transfer of any land had been done.*
7. *The Grant herein was confirmed. It distributed the estate equally among the 2 houses.*

It was the duty of the Applicant to prove his ground by way of evidence. All that has come out from the evidence of the Applicant and his witnesses is that the respondent is an only son and his sisters are all married so he would get more land than the others. Section 40(1) of the Law of Succession Act provides:-

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

The issue of married or unmarried daughters does not arise as all children are the same before the Law. The issue of married and unmarried daughters will only be entertained where all the family members are in agreement on it. Therefore all children (unless by agreement opt out) are entitled to a share of their parent's property. Grand children will inherit through their own parents who are children of the deceased.

Having found that the deceased had 2 wives who had 5 children each the estate was divided into two equal portions. This is in strict compliance with Section 40(1) of the Law of Succession Act. There has been nothing availed before this court to enable me interfere with the said confirmed grant.

I find no merit in the application which I dismiss. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31ST DAY OF JULY 2013.

H.I. ONG'UDI

J U D G E

In the presence of :-

Mr. Githinji for Mugambi for Petitioner

Respondent

Njue CC