



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Misc. Civ. Appli. 319 of 2002

MURIUKI MWANIKI APPLICANT

VERSUS

SAMUEL HAPPY MWARA KINYUA RESPONDENT

RULING

On 18th December, 2002 Muriuki Mwaniki, hereinafter referred to as the applicant filed an application seeking that the letters of administration issued in Kerugoya Succession Cause number 308 of 2001 on 16th January 2002 and confirmed on 19th August, 2002 be revoked and or annulled. The grounds in support thereof were that the proceedings to obtain the same were defective in substance and that it was obtained fraudulently by making false statement or by the concealment from the court of some thing material to the case by Samuel Happy Mwara Kinyua, hereinafter referred to as the respondent. In support of the application, the applicant deponed in the supporting affidavit that:-

“2. That I was given the land parcel No. KIINE/KIANGAI/791 by the applicant herein who is the real brother of the deceased.

3. That I know respondent well and he is not the nephew of the deceased but a clan member.

4. That the respondent obtained the grant fraudulently by giving, false statement in the proceedings of Kerugoya Succession Cause No. 308/2001.

5. That the respondent is therefore not the right administrator of the estates of the deceased’s (sic) of administration granted to him by Kerugoya court are supposed to be revoked and/or annulled and be granted to the applicant.”

The application was further supported by another affidavit sworn by one Leonard Maina Murage. In pertinent paragraphs he deponed as follows:

“1. That I live and depend on the estate of the above named GAKURU KABWI {Deceased} and therefore competent to swear this affidavit.

2. That I was given the land parcel No. KIINE/KIANGAI/791 by the applicant herein who is the real brother of the deceased.

3. *That I know respondent well and he is not the nephew of the deceased but a clan member.*

4. *That the respondent obtained the grant fraudulently by giving, false statement in the proceedings of Kerugoya Succession Cause No. 308/2001.*

5. *That the respondent is therefore not the right administrator of the estates of the deceased's of administration granted to him by Kerugoya court are supposed to be revoked and/or annulled and be granted to the applicant."*

When served with the application, the respondent reacted by filing a replying affidavit in which he deponed thus:-

"3. That I oppose the same most strongly.

4. *That the applicant is not related to the deceased at all.*

5. *That I am closest to the deceased in the degree of consanguinity as he is a cousin to my father as the deceased's father and my father were brothers.*

6. *That the applicant is just being motivated by greed.*

7. *That the application lacks merit and should be dismissed with costs."*

On 11th March, 2003 Juma J (as he then was) gave directions that the dispute be heard by way of viva voce evidence. On 6th October, 2008 the hearing of the dispute commenced before me. First to take the stand was the applicant. He testified that he knew Gakuru Kabue, the deceased. That the deceased and his father were paternal cousins. The deceased had brother called Kanja who had also passed on. The deceased had no children. However he was the registered proprietor of land parcel number Kiine/Kiangai/791 hereinafter referred to as "*the suit premises.*" The deceased was a Muslim residing in Mombasa and never utilized the suit premises. He left the suit premises to the applicant. The respondent was a clansman but not a relative of the deceased. Following the death of the deceased the applicant did not petition for letters of administration intestate of the deceased estate. However he was the closest relative of the deceased and ought therefore to inherit the estate of the deceased.

Under cross examination by Mr. Wahome, learned counsel for the respondent, the applicant stated that he knew the respondent's father as Kinyua. That the father of the deceased was not a brother to the respondent. That the respondent was not the closest to the deceased. His father and that of the deceased were not brothers. That he had never seen them. In support of his case, the applicant also called Leonard Maina Murage as his witness. He testified that the wife of the applicant was his aunt. That the father to the deceased and the applicant were brothers. The deceased owned the suit premises but had since 1970 never set foot on the suit premises. Indeed it is this witness who was occupying the suit premises courtesy of the applicant. The respondent was not entitled to be issued with the grant. That the applicant is entitled to the suit premises as the deceased had given him the same and also because he was the closest of the kins to the deceased.

When cross examined by Mr. Wahome the witness stated that the father of the deceased and applicant were brothers. That he did not know the respondent. That his mother and the wife of the applicant were sisters. This marked the close of the applicant's case.

For the respondent, only him testified. It was in these terms. He knew the applicant. However they were not related though they came from the same clan. That he petitioned for the grant of letters of administration in respect of the deceased estate as the deceased's was his uncle. That his father and the deceased's father were step brothers. Thus he was a nephew of the deceased. That the deceased had no children nor brother, the only brother having passed on earlier. That he knew PW 2 as he had come to him to ask him to be sold a portion of the suit premises on which he had built a house on. That he did not lie to the court when he sought the grant of letters of administration.

When cross examined by Mr. Chomba, learned counsel for the applicant he responded that PW 2 stays on the suit premises but he himself does not. That he knew the applicant however he does not belong to the same clan as the deceased. That he did not know the relationship between the deceased and the applicant. That he did not involve the applicant in the petition as he was a stranger to the estate of the deceased. With that the respondent closed his case. Thereafter parties agreed to put in written submissions. This was subsequently done. I have carefully gone through and considered the said written submissions.

From the evidence tendered it is the contention of the applicant that the respondent concealed to the trial court the true heirs of the estate of the deceased and also lied about his relationship with the deceased and also failed to disclose the fact that it's the applicant who has always lived and worked the suit premises. The respondent on the other hand has never occupied nor utilized any portion of the suit premises. He was not related to the deceased at all though he was a clansman.

The case for the respondent however is that he is a nephew of the deceased. He knew the applicant though. However he belonged to another clan from the deceased's. He did not therefore belong to the deceased's family tree. That he met the applicant and his witness at their local chief's office when they had a dispute over the suit premises. He also admitted to have not informed the applicant when he filed the succession proceedings at Kerugoya and has never occupied the suit premises since 2006 upto date despite having obtained the grant.

It is common ground that the deceased passed on intestate in 1971, a Muslim and never left behind any issues and or wife. Thus he was survived by distant relatives and or clan members. It is also common ground that the deceased was the registered proprietor of the suit premises and that it is occupied by the applicant and his witness to the exclusion of the respondent who though is in possession of a confirmed grant has never taken the trouble to take possession of the suit premises by way of transmission. Instead he stays away in Juja where he is a businessman. The letter issued to the respondent dated 9th March, 2001 by the chief Tudor location in Mombasa did not claim that the respondent was the only relative of the deceased. Similarly the letter addressed to this court by the District Officer, Ndia Division dated 23rd July, 2001 in which the District officer confirmed the wish of the respondent to inherit the suit premises, did not however say that only the respondent was entitled to inherit the same. There is also evidence that the applicant and the respondent had a dispute over the suit premises that was arbitrated upon by the local chief. However the decision of the chief was not tendered in evidence. The issue of the dispute having been arbitrated upon by the chief came through the evidence of the respondent. It is trite law that he who alleges must prove. It would have helped the respondent's case if he had tendered in evidence the decision of the chief on the dispute. The totality of all the foregoing is that the respondent concealed from court something material to the case, the presence of the applicant and his witness in the suit premises.

Both the applicant and the respondent were really not articulate about their relationship with the deceased. However one thing is clear to me. Both of them were somehow related to the deceased. They were distant relatives. From the evidence I am unable to hold that the respondent was a nephew of the deceased nor was the applicant a cousin of the deceased. The net effect of this holding is that though both the applicant and the respondent were somehow related to the deceased section 39(1) (e) of the Law of Succession should be involved for purposes of determining the degree consanguinity. It is for this reason that I find that the application has merit and I allow it.

Besides the foregoing, I would have still allowed the application on the grounds that the trial court had no jurisdiction to hear and determine the cause. This cause was filed in the Principal Magistrate's court at Kerugoya as Succession Cause number 308 of 2001. In the affidavit in support of the petition for letters of administration intestate, the respondent had indicated the total estimated value of the deceased's estate as Kshs.200,000/-. According to section 48 and 49 of the Law of Succession Act jurisdiction of the magistrate's courts to preside over succession causes is limited to the estate whose value does not exceed Kshs.100,000/-. A party is bound by his/her own pleadings. In the instant case the respondent having pleaded that the estate of the deceased was worth Kshs.200,000/- he automatically ousted the jurisdiction of the Principal Magistrate's court to hear and determine the succession cause. The grant issued on 16th

January, 2002 and confirmed on 19th August 2002 was thus made without jurisdiction. Accordingly such grant is liable to revocation.

In the premises I allow the application. The grant issued herein on 16th January, 2002 and confirmed on 19th August, 2002 is hereby revoked. The applicant shall have the costs of the application.

Dated and delivered at Nyeri this 29th day of January 2009.

M.S.A. MAKHANDIA

JUDGE