REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 35 OF 2000

IN THE MATTER OF THE ESTATE OF NJIRAINI GAKUYA MARIRA – DECEASED

EPHANTUS NGARI NJIRAINE ……...…… PETITIONER

Versus

NEWTON WANJOHI MWAI (*legal representative*

***of Stanley Mwai Njiraini deceased*) ……..…...…… APPLICANT**

JUDGMENT

The deceased Njiraini Gakuya marira had four sons as follows:-

a) Stanely Mwai Njiraini

b) Ephantus Ngari Njiraini

c) Peter Kangangi Njiraini

d) Charles Ndege Njiraini

The deceased died on 22nd August 1978. Ephantus petitioned for Letters of Administration Intestate for this estate. By that time of petitioning Stanley had died. The petition was supported by consent which although it bore the names of the petitioner's brother and the name of Jemimah Gachuhi the widow of Stanely the only person who executed that consent was Peter. This matter was before the Honourable Mr. Justice Juma (as he then was) on 29th September 2000. The honourable judge issued an order that a grant be issued. That grant was confirmed on 9th November 2001. This judgment relates to summons dated 23rd December 2003 filed by Newton Wanjohi Mwai son of Stanley Mwai deceased. The summons for revocation of grant. Revocation is sought on the basis that the grant was obtained by fraudulent means by the petitioner making false statement or by concealment from the court something material to the case. Newton in support of that summons stated in viva voce evidence that he was the first born son of Stanley. That the estate of his grandfather comprised of parcel no. MUTIRA/KATHARE/27. He said that whilst the deceased was alive Stanley and his family lived on the parcel no. 27 together with other sons of the deceased. He said that Stanley had between seven hundred and fifty and a thousand coffee bushes on that parcel of land. He produced in evidence a letter from Mutira Farmers Cooperative Society

Limited. I did however note that the letter did not specify the land upon which the coffee stems were planted. In my view therefore although the letter was produced in evidence it did not assist in supporting Newton's evidence that his deceased father's coffee bushes were on parcel no. 27. The same thing goes with the receipts that he exhibited as no. 5(a) and (b). The witness continued to state in evidence that Stanley had a posho mill on parcel no. 27. To prove this he produced a public health clearance certificate dated 10th June 1998. I have scrutinized that certificate and it shows that it was issued for the operation of a posho mill at Market Mutira/Kathare. In my view looking at that exhibit it looks like a different pen was used to add parcel no. 27 to that certificate. It is also pertinent to note that the health certificate was issued for 1988. For the court to believe that the posho mill is being operated todate or that it was operated beyond 1988 there ought to have been an up todate certificate. I take judicial notice that such certificates are issued every year for the purpose of assisting the person operating such a posho mill in obtaining an annual license. The exhibit no. 6 that is the Health Certificate is indeed addressed to the Licensing Officer Kirinyaga. Newton however stated in evidence that the posho mill was being operated with the consent of the deceased herein. Newton further stated that the petition filed in this cause was filed without his knowledge. He came to know that it had been filed when a letter was addressed to his former advocate. On making inquiry he found that his father's name did not appear in the petition. He prayed that the grant be revoked and parcel no. 27 be divided equally between the four sons of the deceased. He confirmed that Stanley his deceased father owned parcel no. MUTIRA/KATHARE/30. This parcel of land he had been given by the clan before demarcation of land. Newton stated that the petitioner Ephantus was also allocated land at Mwea Irrigation Scheme. On being cross examined this witness stated that parcel no. 27 was larger than parcel no. 30. He said that he was unaware that the deceased before death had began to subdivide parcel no. 27. On being questioned about his deceased father's parcel no. 30 he stated:-

"***My father is first born of my grandfather. Maybe my grandfather ensured he got land at that time."***

In further cross examination he accepted that the deceased had sued his father in RMCC Nyeri no. 134 of 1976. He also accepted that the court made a finding in that case that his father had no beneficial interest in parcel no. 27. PW 2 was a nephew of the deceased. He said that he was a 100 years old. He confirmed that Stanley had constructed on parcel no. 27 but he was not specific what had been constructed. He stated that Stanley also had a posho mill, coffee bushes Macadamia trees, and banana trees. He said that before the death of the deceased, the deceased had summoned him and had told him that his parcel of land was to be divided amongst his four sons. My assessment of this witness is that he was not a credible witness despite his advanced age. On being pinned down during cross examination on how parcel no. 27 is occupied he avoided answering that question by saying:-

"***No one enters parcel no. 27 so I don't know what else (Stanley) has."***

PW 3 was Igati Mwai an advocate of the High Court. He also was a son of Stanley. He said that he did not get to know that a petition had been filed in this cause until after the grant had been confirmed. He stated that Stanley his father had parcel no. 30. This was a first registration. In turn he said that the petitioner Ephantus had a parcel of land in Mwea Scheme. He stated that Stanley had a posho mill, macadamia trees on parcel no. 27. He said that the area developed by Stanley his father from parcel no. 27 should be given to the applicant. On being cross examined he stated that he himself had a house on parcel nos. 27 and 30. PW 4 said that he comes from the same clan as the deceased. He too confirmed that Stanley had a posho mill, macadamia trees and coffee on parcel no. 27. In his view the applicant ought to inherit the share of Stanley's portion on parcel no. 27. Although this witness had claimed to know the deceased very well he denied that the deceased had a court case with Stanley. It therefore follows that his alleged knowledge of the deceased was limited since this was accepted by the applicant. His knowledge was limited to supporting the applicant's case. The petitioner in his evidence stated that the deceased did not reserve any land for Stanley on parcel no. 27. This is because Stanley had his own land parcel no. 30. He denied that Stanley had any property on parcel no. 27 except a posho mill. That posho mill he said was built in 1970 and had stopped being operated a long time ago. That even Newton the applicant had tried to operate it but it smoked until he had to switch it off. He said that when he was filing the petition herein he requested Jemima the wife of Stanley to sign the consent but she declined on the basis that she had her own parcel of land. He however stated that she was aware of this succession

cause. He therefore denied that he petitioned secretly. He further stated that it was gazetted in the Kenya gazette. He said that Charles Ndege his other brother had consented to the petitioning but he could not sign the consent because he was away at the time. He then referred to an application for consent of subdivision and transfer which he said was prepared by the deceased and related to parcel no. 27. The consent that was granted indicated that parcel no. 27 was to be subdivided and registered as follows:-

a) Ephantus Ngari Njiraini – 2.75 hectares

b) Peter Kangangi Njiraini– 2.75 hectares

c) ***Charles Ndege Njiraini– 2.75 hectares***

That the deceased died before completing that transaction. He further referred to the judgment in RMCC Nyeri 134 of 1976 whereby the court stated in its judgment that Stanley had no basis of having a caution over parcel no. 27. The court by that judgment ordered that the caution by Stanley be removed from that title. The petitioner was cross examined and in response he stated that Stanley was allocated parcel no. 30 in 1958. This was during the period of demarcation of land. During that time he said that he was still attending school. His brother peter was 15 years old and Charles was 5 years old. Their deceased father intended the three of them to share parcel no. 27. At that time Stanley was 23 years old. He denied the evidence of the applicant that Stanley in his lifetime occupied parcel no. 27. He confirmed that the land in Mwea he had acquired it after balloting at the Mwea scheme in 1970. He denied that it had been allocated by the clan. Peter Kangangi gave evidence and stated that he person took the consent form to Jemimah for signature. She declined to sign on the basis that she had her own land. It should be noted that Jemimah is now deceased. DW 3 was a member of the committee allocating land during demarcation. He stated that he was also a clan and a sub-clan of the deceased. He stated that Stanley was allocated parcel no. 30 by virtue of being a son of the deceased. That it was the deceased who request that he be allocated that parcel of land. That Stanley was an adult at that time. He stated that the deceased desire was to have parcel no. 27 divided amongst his 3 sons.

The application for revocation is based primarily on two grounds. Firstly is that the petitioner did not obtain consent to petition from the beneficiaries and only obtained such consent from Peter. The second issue is that the mode of distribution adopted by the petitioner excluded the family of Stanley Mwai deceased. In support of the first issue the applicant relied on the case **SUCCESSION CAUSE NO. 19 OF 2007 IN THE MATTER OF THE ESTATE OF KANGURU WACHIURI (DECEASED).** The applicant specifically relied on the following portion:-

"***The petition having been filed after the date of commence of this act the petitioner was required to follow the laid out procedure as far as was possible. Accordingly as of necessity the petitioner ought to have obtained the consent of the other beneficiaries to this estate. Having failed to do so he did fail to follow the laid down procedure."***

The applicant relied on this portion of that case to advance his case that the grant should be revoked for having been issued when all the beneficiaries did not consent. I have read that authority that the applicant relies upon and I find that the grant which was considered for revocation in that case had been issued by a Principal Magistrate's Court. In this our case the grant was issued under the orders of a High Court Judge Hon. Mr. Justice Juma (as he then was). That alone is a distinctive feature from this case. This court as it is well known can not sit on an appeal against an order of another High Court Judge. Secondly in that authority of the applicant it is not clear when the deceased died. In this case the deceased died before the commencement of the Law of Succession Act. Section 2(2) of The Law of Succession Act provides that where estates of persons who died before the commencement of the Law of Succession Act the administration would commence or proceed so far as possible in accordance with that Act. That section does not call for absolute adherence of the procedure of that Act. In my view it is therefore arguable that failure to get all the beneficiaries to sign a consent does not necessarily lead to a finding that the grant will be revoked. The second issue that I need to consider is whether the grant should be revoked because Stanley was not given land of the deceased. The applicant relied on the case of KARANJA KARIUKI V KARIUKI (1983) KLR where the court of appeal held thus:-

"***1. Under Kikuyu Customary Law, a father has to distribute his land among his heirs during his lifetime. He may make a will in old age or on his death bed and the only formalities required are that he must say before elders of his family (Mbari) and of the clan (Muhiriga) and close friends only who the administrator (Muramati) of his estate will be and to whom (among his heirs) each item of such estate will go.***

2. There is a well entrenched principle of customary law among the kikuyu that the eldest son normally inherits land upon the death of his father. This rule is indefeasible except in a case of disability arising from infirmity of the body or mind or from any other cause or any relinquishment by the eldest son himself.

3. The view that any son of a Kikuyu father who dies intestate could not inherit any of his father's property save on trust for himself and his brother was incorrect."

The holding in that case clearly shows that an elderly Kikuyu man may make a will in his old age or at his death bed. From the evidence adduced before court I find that the deceased expressed his wishes clearly in his application for consent to subdivide and transfer to his three sons his land. Those three sons excluded Stanley. His desire not to give Stanley a portion of parcel no. 27 was reinforced by the suit he filed being RMCC Nyeri no. 134 of 1976 where he obtained an order for Stanley to remove a caution registered on that title. Stanley had registered a caution on the basis of his claim of having a beneficial interest on that land. The judgment of that case must have found that Stanley had no interest in parcel no. 27. The evidence of posho mill or the trees on parcel no. 27 allegedly owned by Stanley do not advance a claim for inheritance in law. I have considered the applicants submission and I need to say that I find it unprofessional for counsel to seek to submit on matters that were not adduced in evidence before court. That practice should cease. In the end the judgment of this court is that the summons dated 23rd January 2003 is hereby dismissed with costs being awarded to the petitioner.

MARY KASANGO

JUDGE

Dated and delivered this 14th day of May 2009

M. S. A. MAKHANDIA

JUDGE