



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

Misc. Appli. 144 of 2002

MAINA KANORU.....APPLICANT

VERSUS

MIRIAM WANJIKU WAITHAKA.....RESPONDENT

J U D G M E N T

In the summons for revocation of grant dated 3rd April, 2002, **Maina Kanoru**, hereinafter referred to as “*the applicant*” prays that this court annuls the grant of letters of administration intestate issued to the **Miriam Wanjiku Waithaka**, hereinafter referred to as “*the respondent*.” The application is premised on the grounds that the respondent misled the court into believing that she is a wife of the deceased which fact was false, that the respondent lied that one **Edward Kariuki Maina** was a beneficiary whereas he was a purchaser and finally that the respondent concealed to the court the fact that the applicant had been in occupation of the deceased estate for over 29 years and had carried out extensive development. That the respondent’s act of selling the deceased’s estate to a third party was tainted with illegality in that the court’s sanction was not sought.

The genesis of this dispute is the death of one **Kariuki Mukuru**, hereinafter referred to as “*the deceased*” sometimes in or about 1966. He was the father to the respondent and a grandfather of sorts to the applicant. The net estate that the deceased left behind consisted of land parcel No.**Loc.8/Kaganda/508** hereinafter referred to as “*the suit premises*.”

Following the death of the deceased the respondent petitioned for the grant of letters of administration intestate in respect of the estate of the deceased. The same was granted on 8th December, 2000 and confirmed on 9th November, 2001. Thereafter the respondent moved the court to rectify the confirmed grant and the mode of distribution was substantially changed in that now a purchaser for value, one **James P. Irungu Waithaka** was to get the entire suit premises as a beneficiary. In petitioning for the grant, the respondent according to the applicant willfully refused to cite him and yet he had been in occupation and exclusive use of the suit premises for well over 29 years and had planted well over 2900 tea bushes. To the applicant the act of rectifying the grant was with a view to enabling the purchaser masquerading as a beneficiary, get the suit premises which act was a manifestation that the respondent was not at all interested in administering the estate but rather to waste it. Finally it was the contention of the applicant that the effect of rectification was to substantially change the mode of distribution which the subordinate court could not do once it had confirmed the grant.

Having filed the application for the revocation of the grant based on the aforesaid grounds, the applicant served the same on the respondent. The respondent’s reaction was to file a replying affidavit in which she deponed that the applicant was neither a grandson nor a beneficiary of the estate of the deceased. That the applicant had not been in occupation of the suit premises for 29 years as claimed nor

has he developed the same with over 2900 tea bushes. That she had no legal obligation to cite the applicant in her petition for letters of administration since he was not a beneficiary. She denied allegation of fraud.

On 17th September, 2002, this court gave directions that the instant dispute be heard by way of viva voce evidence. Pursuant to those directions the formal hearing of the dispute commenced before me on 12th November, 2007 with the applicant testifying. In summary he testified as follows: That he was a grandson to the deceased and the suit premises belonged to the deceased. That the deceased had no brothers. That the suit premises were sold to his father by **Douglas Muhoro**. He wanted the suit premises because his father had bought it. That his father passed on in 1987 when he had planted tea branches on the suit premises numbering about 3000 which he has been picking and delivering to Kenya tea Development Factory. He tendered in evidence payslips for the tea delivered. Nobody had laid any claim for the suit premises from the deceased family. He went on to testify that when the deceased passed on, the respondent filed this succession cause in which she described herself as a wife of the deceased when in fact she was a daughter. She therefore lied to the court. Finally the applicant testified that he was not aware that the respondent had petitioned for the grant of letters of administration. It was for that reason that he sought the revocation of the grant. The applicant was not cross examined by counsel for the respondent at all on this testimony. The applicant went on to call **Gaitho Njuguna** as a witness. He testified that the deceased was a step brother to his father. He confirmed that he knew the respondent as a daughter and not a wife to the deceased. That the suit premises had been inherited by **Muhoro Kihara**, a nephew of the deceased who in turn sold it to the applicant's father in 1966 for Ksh.1,500/=. That the deceased did not have son but daughters who were all married. That the dispute had been the subject of arbitration before the area Chief who ruled that the land belonged to **Muhoro Kihara** who had a right to sell it to **Kanoru Kuria**. Under cross-examination, by **Mr. Muthui**, counsel for the respondent, the witness stated that the respondent should not have inherited the suit premises because she refused to take it when offered by the deceased during his lifetime. She claimed that she could not take up the land as long as her father was alive. The witness also claimed that he was a witness to the sale agreement of the suit premises.

In her part, the respondent testified and called two witnesses. Her evidence was along the following lines. That she was the daughter and not wife of the deceased. That the people listed in paragraph 2 of the affidavit in support of the confirmation of the grant were the only beneficiaries of the estate of the deceased. That whoever typed the documents made a mistake by referring to her as a wife and not daughter of the deceased.

Hudson Kuria, her first witness testified in a nutshell as follows: that he knew the deceased as he came from his clan. The deceased left behind **Wanjiku**, **Mukuru** and **Waihuny** who should inherit the estate of the deceased. He confirmed that the respondent was the daughter and not wife of the deceased. That he was one of the sureties to the respondent in her petition for letters of administration and he did so knowing that the respondent was a daughter and not wife of the deceased. He conceded that he knew the applicant and that he was related to the deceased. However he could not inherit the estate of the deceased as he was not his son. Finally he stated that he knew **James Irungu Waithaka**, the purchaser of the suit premises. That the suit premises ought to go to him. Under cross-examination by **Mr. Irungu**, learned counsel for the applicant, the witness stated that under Kikuyu Customary Law, a daughter can inherit her father's estate even if she is married. That the respondent should inherit the suit premises on behalf of her siblings and that she was a daughter and not wife of the deceased.

Finally **Macharia Ngure** testified on behalf of the respondent. He stated that he knew the deceased as he came from his village. The deceased had three daughters who should inherit his estate. That the applicant is not related to the deceased and cannot inherit the deceased's land over his daughters. Under cross-examination, he conceded that the suit premises were however cultivated by the applicant.

When the hearing of the dispute was concluded, respective counsels opted to file written submissions in support of their positions which I have carefully read and considered.

Section 76 of the Law of Succession Act provides for circumstances under which a grant can be

revoked. The grant whether confirmed or not can be revoked or annulled at anytime by court either on application by any interested party or of its own motion on grounds that the proceedings to obtain the same were defective in substance, that the grant was obtained fraudulently by making of a false statement or concealment of material facts to the court or by making of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding the allegation was made in ignorance or inadvertently. Finally it can be revoked if it is shown that the person to whom it was made has failed to apply for confirmation or to administer the estate properly.

Based on the above criteria, is there sufficient evidence placed before me to warrant the revocation of the grant? On my part I have no hesitation whatsoever in answering the question in the positive. I must however point out that the evidence which was led was of very little assistance in the resolution of the dispute as it dwelt at length with who between the applicant and the respondent was entitled to inherit the suit premises. The evidence tendered had very little to do with whether the grant was obtained properly and in accordance with the law. The evidence led also tendered to cast the applicant as a stranger and or distant relative of the deceased who is not entitled to question how the estate of the deceased had been administered or even to apply for the revocation of the grant. Yet section 76 of the law of Succession Act is clear; the application for revocation of the grant may be made by any interested party or the court on its own motion i.e. *Suo Moto*. This means that one does not have to be a relative, beneficiary, or dependant to seek a revocation of a grant. The test here is “**any interested party.**” No doubt the applicant was one such interested party despite the rather misty relationship between him, the respondent and or the deceased. It is not quite clear from the evidence how the applicant was related to the deceased or even the respondent. One thing however is certain and that is that the three were somehow related. He has been in occupation of the suit premises for well over 29 years. This evidence was not seriously challenged nor controverted. Indeed he tendered in evidence payslips from K.T.D.A showing that he had been harvesting tea from the suit premises and delivering the same to the tea factory. The respondent and or his witnesses did not dispute this fact. Infact they confirmed that claim. There is no denying that the respondent and all her sisters are married and have never been in occupation of the suit premises. Based on the foregoing I think that the applicant has been able to demonstrate that he is not a stranger and or busy body to the estate of the deceased. He has shown sufficient interest to move this court to annul or revoke the grant if this court is satisfied that the threshold set out in *section 76* of the Law of Succession Act has been met.

There is no doubt that the respondent was daughter and not a wife to the deceased. She conceded to that fact in her testimony. Similarly all the witnesses who testified confirmed that the respondent was a daughter and not wife to the applicant. Yet in her petition for letters of administration intestate she referred to herself as the wife of the deceased. Similarly in the affidavit in support of the petition for letters of administration intestate she still maintained and described herself as the wife of the deceased. Finally in the affidavit in support of summons for confirmation of grant, she still described herself as a wife of the deceased. All along she knew by describing herself as such she was lying. If she can lie brazenly on such an important and emotional issue, what else has she lied on. In abid to save her face in the light of the brazen lie, she did albeit unsuccessfully attempt to amend the documents orally by proclaiming in evidence that she was not aware that she had been referred to as a wife in those documents and that whoever typed the documents made a mistake by referring to her as a wife of the deceased instead of the daughter. I was prepared to accept that the reference of the respondent as a wife and not a daughter was inadvertent error on the part of the person who prepared the documents if only the mistake was in one document. However the situation here is different. The mistake could not have occurred in all the three documents which were prepared at different times. It was not a mistake but a deliberate ploy by the respondent to mislead the court into issuing her a grant as a wife since wives rank in priority over all other persons in so far as the administration and distribution of the estate of deceased husband is concerned. I also agree with **Mr. Gacheru**, learned counsel for the applicant when he submits, that the purported about turn of the respondent in his oral evidence cannot advance her case as it is trite law that an affidavit cannot be orally amended, secondly, her advocate was examining her on the affidavit in support of summons for confirmation of grant and not on the affidavit in support of her petition for the grant of letters of the administration intestate.

Rule 7 (1) of the Probate & Administration Rules provides that the information in the affidavit should

be within the knowledge of the applicant. The marital state and description of all surviving spouses should be outlined. This is for the purposes of determining the degree of consanguinity. The respondent clearly falsified the forms by claiming she was a wife when she was not so as to benefit from the degree of consanguinity.

Mr. Muthui submitted that much as the deceased passed on before the Law of Succession Act came into force his estate pursuant to *section 2(2)* of the law of Succession Act still fell to be administered in accordance with the written law and customs applying at the material time. Nevertheless the administration of the estate would proceed in accordance with the Act. According to counsel therefore, the procedure to be followed must be in accordance with the law of succession act. This cannot possibly be correct considering that the deceased passed on in 1966 whereas the Law of Succession Act came into force in 1981. In my view therefore the substantive law applicable would be customary law so long as it does not run foul of the provisions of *section 3 (2)* of the Judicature Act. The Kikuyu Customary Law treats a wife differently from the way it treats a daughter more so a married one on issues of inheritance. The interest of a wife in the estate ranks higher than that of a married daughter. Is it smaller wonder then that the respondent elevated herself to the position of the wife as opposed to a daughter.

Mr. Gacheru has also submitted and correctly so in my view, that the issue of possession is crucial in matters of succession in Kikuyu customary Law. The respondent concealed the issue of who was in actual possession of the suit premises for that reason. It is common ground that, at the time of the deceased death, the respondent had not been put in possession of the suit premises by the deceased. Indeed there is evidence that when the deceased attempted to do so the respondent flatly rejected and turned down the offer.

The respondent also concealed the true identity of her co-beneficiaries listed in form P&A5. Yet in court she spoke of two other sisters. However they were not listed in the said form nor was their consent sought and obtained. In court she tried to wriggle out of the mess by alleging that **Margaret Wairimu Maina** was wrongly indicated in the affidavit. She said that the name ought to have been **Waihunyu Kariuki** and that 3 men, **Kariuki, Ngure** and **Maina** were sons of her other sister who is dead. These gentlemen were never called to lend credence to the evidence of the respondent, nor does any of the witnesses who testified know them. Considering that the respondent has cheated in so many other documents, it is difficult to believe her on this one as well.

The respondent has faulted the application on form. Her position is that any interested party seeking revocation or annulment of a grant must come under either *section 76(a), (b), (c) or (d)* of the Law of Succession Act. That it is not sufficient to merely cite *rule 44 (1)* of the Probate and Administration Rules as the applicant has done. I do not think that such submission carries weight. It is clear from the body of the application that the application is for the revocation of the grant and the grounds upon which it is made. In any event, *rule 73* of the Probate and Administration rules has invested this court with inherent powers to make such orders as may be necessary for the ends of justice. The Law of Succession Act is in my view a verse to undue technicality such as being pushed by the respondent herein.

The respondent maintains that she did not mislead the court as she clearly stated in the petition for letters of administration that she was presenting the same in her capacity as a daughter, so her counsel submits. I have looked again at the petition for letters of administration as filed by the respondent and I have no doubt at all that counsel's submissions is not borne out by the record. In any event the respondent herself in evidence has conceded that she was erroneously referred to as a wife.

The respondent has also faulted evidence of the applicant to the effect that he had been in continuous and uninterrupted occupation of the suit premises for 29 years. According to the respondent's counsel, the applicant was indirectly basing his claim to the suit premises by virtue of the doctrine of adverse possession. Nothing can be further from the truth. The applicant merely led evidence to demonstrate that he was in occupation of the suit premises so that he was entitled to be considered in the event of letters of administration to the estate being issued. He deserved to be cited at least. The respondent has also contended that the applicant has not established the *Locus Standi* in the matter. For this submission I only need to refer the respondent to *section 76* of the law of Succession Act which allows any interested party

to apply for the revocation of the grant. In any event if there is need for *Locus Standi*, the applicant had it as he was occupation of the suit premises.

The respondent also questioned the manner in which these proceedings were commenced in this court. He claimed that the cause for revocation or annulment of the grant cannot be initiated by a miscellaneous application as the applicant had intituled the instant application. It should be noted that the grant sought to be revoked was issued in the Magistrate's Court at Murang'a. To revoke such grant, the applicant is required to come to this court and not in the proceedings in Murang'a Court. It is only after he had filed the application in this court that the proceedings in the Subordinate Court were called for. It therefore matters not that the application was commenced as a miscellaneous application. In any event what prejudice has the respondent suffered? None whatsoever. My take on this is that the respondent is merely clutching on straws for survival in the light of overwhelming evidence regarding her misconduct in the whole matter.

Finally, the respondent has urged me not to allow the application as it may result in a loss to a 3rd party to whom the suit premises were sold and transferred to following the rectification of the grant. That third party, **James P. Irungu Waithka** was an innocent purchaser for value without notice. I am not without considerable sympathy for the third party. However I do not think that his case is so hopeless that he has no remedy. His remedy lies in *section 93 (1)* of the Law of Succession Act.

In the end the conclusion I have come to is that the grant was obtained through fraud, cheating and concealment of material facts. The respondent lied repeatedly that she was a wife of the deceased whereas she was a daughter. She also concealed the identity of her co-beneficiaries and the fact that the applicant was in occupation of the suit premises. It is obvious that the grant was obtained fraudulently by making of a false statement and concealment from the court of something material to the case. It is on that basis that I now revoke the grant issued to the respondent on 8th December, 2000 and confirmed on 9th November, 2001. This is a land dispute among family members. In the circumstances, it is just that costs should not be awarded to any party.

Dated and delivered at Nyeri this 3rd day of June, 2008

M.S.A. MAKHANDIA

JUDGE