



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE 166 OF 2000

MUGAMBI MUKIIRA PETITIONER

JUDGMENT

The petitioner brought this cause for a grant of representation to administer the estate of the late M’Ndegwa M’Mukira. In the petition the petitioner described himself as the brother of the deceased. This was confirmed by a letter of the chief, Kinoro location dated 15th November, 1999.

According to the documents filed by the petitioner in support of the petition, he averred that he was the only surviving dependant of the deceased. However, in the affidavit in support of his application for confirmation of the grant, the petitioner proposed that the only property left by the deceased, L.R. NO. IGOJI/KINORO/503 be registered in his (the petitioner’s) name and that of Leonard Njeru Chabari, with the latter taking 3 acres and the petitioner the balance. On the basis of this proposal, the grant was confirmed and certificate duly issued.

Subsequently, the two objectors herein brought summons for revocation of the grant arguing that the grant was obtained fraudulently by making of a false statement or concealing from the court material facts. That the true beneficiaries of the estate have been left out.

On 17th October 2005, a consent was recorded in which the parties agreed that the confirmed grant be annulled and any property of the deceased that may have been transferred to the petitioner or any third party to revert to the estate. It was further agreed that the objectors herein or any other beneficiary be at liberty to file an objection/answer or cross-petition within 30 days from the date of the consent. Finally parties agreed that the only issues to be canvassed at the hearing were those relating rendering of accounts by the petitioner and the calling of Leonard Njeru Chabari during the hearing.

The objectors promptly complied with the consent order and filed an objection to making of grant, answer to petition and petition by way of cross-application and summons for revocation of grant. The latter was unnecessary as the grant had been revoked. The objectors’ contention is that the petitioner did not qualify to file the cause as he was not the deceased person’s dependant.

That the true dependants, being the objectors and two sisters, Sarah Kawira Ndegwa and Caroline Kathomi Ndegwa, were all left out. That the four of them were the children of the deceased. That they have lived on Igoji/Kinoro/503 all their lives. That apart from the land in question the deceased left behind coffee account with Igoji Farmers Co-operative Society, Tea account with Kinoro Tea Factory and personal effect.

The objectors have also stated that the petitioner has been operating both the tea and coffee accounts and

ought therefore to account. Under the provisions of section 69(2) of the Law of Succession, once an answer and a cross application have been filed the court must proceed to determine the dispute. There is no provision, as contended by counsel for the objectors, for the petitioner to reply. The court must proceed to determine the dispute. The proceedings were partly recorded by Sitati, J. As a matter of fact she recorded the evidence of the petitioner and I have recorded the rest of the evidence.

The petitioner testified that the deceased was brought up by his (the petitioner's) father after the death of his (the deceased's) mother. He maintained that the deceased never married and was therefore not survived by any widow or children. That the objectors and their two siblings were not sired by the deceased but came with their mother. He further testified that before the death of the deceased the 1st objector had been taken by his biological father.

Regarding Sarah Kawira Ndegwa the petitioner said that she too had come with the mother. That when her mother was chased away by the deceased she (Kawira) remained behind with the deceased. She was at the time only between four to five years of age and at the time the deceased died she was ten years. The deceased asked the petitioner to take care of Sarah Kawira. He kept his word and has been living with her since. Sarah Kawira was once married but is now living with the petitioner. She has two children.

Similarly it was the evidence of the petitioner that the 2nd objector (Purity Nkirote) like her siblings came with her mother and later left with her again and lived at a place called Mweru and not an Igoji/Kinoro/503 – some 15-17 km apart. He also conceded that he lived some 500m from the home of the deceased.

The 1st objector gave his evidence and called three witnesses, his sister Purity Nkirote (the 2nd objector), a cousin, Salacio Kaburu Kirigia and Assistant Chief Gakeri sub-location, Igoji Location, George Muriungi.

It was the 1st objector's case that he together with his siblings were the only children of the deceased with whom they lived on Igoji/Kinoro/503 from birth. That presently Carolyn Kathomi and Sarah Kawira are married and live elsewhere. That it is only himself, his family and Purity Nkirote who live on Igoji/Kinoro/503. This evidence was confirmed by Purity Nkirote. Salacio Kaburu Kirigia, a cousin, confirmed that the 1st objector and his three sisters were the only surviving children of the deceased. He further confirmed that during the burial of the deceased the petitioner and his children did not attend.

George Muriungi, the Assistant Chief, Gakeri sub-location, Igoji Location, where the land in question is situated, told the court that the letter confirming the dependants of the deceased was not issued by his office but instead by the chief of the neighbouring location, Kinoro.

I have duly considered the evidence adduced by both sides, as well as the written submissions by counsel for the objectors. It is not in dispute that the petitioner is a cousin to the deceased. That the deceased left only one parcel of land Igoji/Kinoro/503. That that property was later transferred to the petitioner through this succession cause. The petitioner on the other hand transferred the same to Leonard Njeru Chabari at a consideration of Kshs. 100,000/=. In turn, the latter transferred it to South Imenti Tea Growers Sacco Society Ltd at a consideration of Kshs. 500,000/=. The 1st objector has since placed a caution on the land.

By consent, all the three transfers were reversed and the land reverted to the estate. That being so, the only two broad issues for determination is whether the objectors and their siblings were the children/dependants of the deceased hence entitled to administer his estate. The second issue is whether the petitioner has intermeddled with the estate and ought to account.

In dealing with the first issue the court will be determining to who the grant ought to be issued. It is the petitioner's case that the deceased was not survived by immediate family because he did not marry and therefore had no children. That, as the only surviving brother, he was the only one entitled to inherit his

property. It was further his case that the objectors and all their sisters were brought to the deceased person's home by their mother and that they were chased away by the deceased. That the objectors and their sisters were not sired by the deceased.

The objectors on their part have maintained that their mother was the only wife the deceased had. That the deceased had four children with their mother. That they had the 1st objector as the only son and three girls. That they have lived on the land in issue all their lives. That the petitioner being a cousin does not rank ahead of them to inherit the estate. Whether or not the objector and his sisters are biological children of the deceased is a matter that can only be resolved by the deceased and the objectors' mother or by DNA. In a situation like this the issue of paternity must be resolved from the circumstantial evidence available. Although the petitioner has disowned the objector and his sisters he confirmed that at one point or another they have lived with the deceased on the land in question. That the 1st objector was born on the suit land. He has also confirmed that he himself has never lived on this land as he has his own land. He has confirmed that he lives today on his land with Sarah Kawira Ndegwa, the sister to the objectors.

He has explained that he took her into his care because the deceased had requested him to. It was also the petitioner's evidence that the 1st objector had put up a house on the suit land and that it was later demolished by the deceased and the 1st objector chased away. But presently, he continues, the objectors are occupying the land and he has never tried to evict them. That the 1st objector has been harvesting tea and coffee from the land.

There is evidence on record that the 1st objector and the three sisters were issued with birth certificates indicating that the deceased was their father. Although this is not a conclusive evidence of paternity, no evidence was brought to support the petitioner's assertion that the certificates were forged. The petitioner admits in his evidence that the 1st objector and his sisters attended the burial of the deceased. He, however, was not sure whether they put the symbolic soil in the grave during the burial. There is evidence that the petitioner did not participate in the burial arrangements of the deceased. That it is the 1st objector and his siblings who made the arrangements.

There is the evidence of Salacio Kaburu Kirigia and George Muriungi, the only two independent witnesses, to the effect that the objectors and the sisters are children of the deceased – and that they have all along lived on the land in question. It was the testimony of George Muriungi that the objectors' mother temporarily left her matrimonial home twice but returned. He also maintained that when the deceased married the objector's mother the latter did not have children. Although the objectors intended to call the chief of Igoji location his counsel changed his mind arguing that his testimony would be a repetition of George Muriungi's evidence.

However, I have come across a letter which is an exhibit annexed to the summons for revocation, written by the chief of Igoji location Ephantus G. Mwongera on 17th April 2003 in which he confirms that the deceased left four children, the 1st objector being the first born. He has accused the petitioner of colluding with the chief of Kinoro location to disinherit the objectors. He explains that after the death of the objectors' mother the 1st objector took to opium taking which appeared to affect his mind. It is because of this that the deceased got close to the petitioner. It was again as a result of this that the deceased entrusted the custody of the title deed with Gitonga Muchumba, a nephew and neighbour of the deceased.

From all the foregoing circumstantial evidence, I come to the conclusion that the 1st objector and his three sisters were children and dependants of the deceased as defined in section 29 of the Law of Succession Act. Having come to that conclusion, in terms of part V of the Law of Succession Act, the objectors rank before the petitioner.

The petitioner, in bringing this cause, swore that he was the only dependant of the deceased. That averment was clearly false in view of my conclusion above. Besides the petitioner having been asked by the deceased to take care of Kawira, he ought to have considered her as a dependant and disclosed this

fact. Further, the petitioner confirmed that the deceased also had a sister. Similarly, the petitioner deliberately and conveniently went to the neighbouring location to obtain the chief's letter to avoid being exposed by the chief of his location who was versed with the estate.

As I have indicated, I did not have the advantage of seeing the petitioner testifying but Sitati, J who received his evidence observed and noted his demeanour twice as being "*deliberately evasive*" and "*evasive and hasty*." His credibility is in question.

Before I conclude, I turn to consider the last issue, namely whether the petitioner has intermeddled with the estate and whether he ought to account. There is evidence on record that the deceased had tea and coffee accounts with Kinoro Tea Factory and Igoji Farmers Co-operative Society, respectively.

Apart from the account number of the latter – 2624, no details of the former was furnished. The petitioner admitted that with the permission of the deceased he operated the account. He continued to do so until he sold the land to Leonard Njeru Chabari. He also confirmed that he withdrew funds but could not tell how much. He further stated that the objector too had an account for 50 coffee trees.

Without the details of the account with Kinoro Tea Factory no orders to account can issue. In the result, I come to the conclusion that the objection and cross-application for grant succeeds. In place of the petitioner, the objectors, Fredrick Marangu Ndegwa and Purity Nkirote Ndegwa shall be appointed administrators of the deceased person's estate. In terms of Order XX Rule 15 of the Civil Procedure Rules there will be a preliminary decree to take accounts of all the transactions in respect of Account No. 2624 with Igoji Farmers Co-operative Society for the period between 26th July 1995 to date. The petitioner is directed to furnish this information on or before 14th January 2009. The matter will be mentioned on 14th January 2009. I award the costs of this suit to the objectors.

Dated and delivered at Meru this 29th day of October 2008.

W. OUKO

JUDGE