



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.385 OF 1999

IN THE MATTER OF THE ESTATE OF NJOROGE GACHOHO (DECEASED)

RULING

By summons filed in the High Court, Nairobi on 23.02.99, Esther Wambui Chege applied under section 76 of the Law of Succession Act (Cap.160) and rule 44 of the Probate and Administration Rules made under the same Act for revocation or annulment of grant of letters of administration intestate issued to Wamukore Njoroge on 28.12.95 by the Resident Magistrate, Thika in Thika Senior Resident Magistrate's Court Succession Cause No.262 of 1994. The grounds for the present application for revocation of the said grant are:-

- a) That the proceedings to obtain the grant were defective in substance.
- b) That the said grant was obtained fraudulently by making of a false statement and/or by the concealment from the court of something material to the case.

The application was accompanied by an affidavit in support thereof stated to have been sworn by the applicant on 23.02.98. The year cited seems to be wrong as the same year had also been cited on the summons but altered to read 1999. I take the date of the supporting affidavit also to be 23.02.99.

It emerges from the applicant's supporting affidavit that the deceased, Njoroge Gachoho died on 28.09.82 and was survived by three daughters:-

- a) Wamukore Njoroge – petitioner in Thika Senior Resident Magistrate's Court Succession Cause No.262 of 1994.
- b) Margaret Wahu Kinuthia.
- c) Esther Wambui Chege.

It is the applicant's case that Wamukore Njoroge (Petitioner in the Thika case), Margaret Wahu Kinuthia and the applicant herein are beneficiaries with priority over all dependants. The applicant deponed that the estate of the deceased Njoroge Gachoho comprised land parcel Number Kiganjo/Kiganjo/205 and that during his lifetime Njoroge Gachoho divided the said land between his three daughters, Wamukore Njoroge, Margaret Wahu Kinuthia and herself (applicant) in equal shares; that this was confirmed by clan elders; and that the applicant and her sister, Margaret Wahu Kinuthia have been occupying their respective portions of the land todate.

The applicant continued to depose that after the death of Njoroge Gachoho, Wamukore Njoroge obtained grant to herself of letters of administration intestate and left her and Margaret Wahu Kinuthia out, knowing very well that the two were also entitled to inherit Njoroge Gachoho. The applicant complained that Wamukore Njoroge caused the entire estate of Njoroge Gachoho to be divided among her own sons, John Mwaura Njoroge and George Chege Njoroge thereby disinheriting the applicant and

Margaret Wahu Kinuthia. Further, the applicant complained that Wamukore Njoroge did not obtain her consent or that of Margaret Wahu Kinuthia in obtaining the grant, nor did Wamukore Njoroge cause the applicant and Margaret Wahu Kinuthia to be cited as parties with an interest in the subject estate. Additionally, the applicant deponed that she became aware of Thika Senior Resident Magistrate's Court Succession Cause No.262 of 1994 upon conducting official search on the subject land on 18.11.98. The High Court file shows that the applicant filed her summons for revocation or annulment of the grant to Wamukore Njoroge within three months of becoming aware of the Thika Succession cause, i.e. on 23.02.99. The applicant complained that Wamukore Njoroge did not obtain her consent and the consent of the other sister, Margaret Wahu Kinuthia as to the mode of distribution of the estate of their father, Njoroge Gachoho.

In view of the foregoing, the applicant contended that Wamukore Njoroge obtained the grant issued to her in Thika Senior Resident Magistrate's Court Succession Cause No.262 of 1994 through misrepresentation or concealment of material facts. The applicant urged that it would be in the interests of justice that the grant to Wamukore Njoroge be revoked to enable her and her other sister, Margaret Wahu Kinuthia to claim their interest in the subject estate.

The applicant was represented in this application by learned counsel, Miss Mwangi of Waithira Mwangi & Co. Advocates who reiterated the contents of the application and supporting affidavit. Applicant's counsel elaborated that it is when the sons of Wamukore Njoroge attempted to evict the applicant herein and her sister, Margaret Wahu Kinuthia from the portion of the deceased's land they occupied that the two discovered there had been the Thika succession cause vide which the entire land of the deceased Njoroge Gachoho was distributed to the two sons of the petitioner in the Thika succession cause, i.e. Wamukore Njoroge.

The Central complaint by the applicant herein is that Wamukore Njoroge caused the entire land belonging to the deceased Njoroge Gachoho to be divided only among her (Wamukore's) two sons while she knew that she (applicant) and the second sister, Margaret Wahu Kinuthia were also entitled to inherit the said land and that Wamukore Njoroge did not obtain the consent of the applicant and Margaret Wahu Kinuthia to exclude them from inheriting the land.

There is in the Thika Senior Resident Magistrate's Court Succession Cause No.262 of 1994 an affidavit in support of Wamukore Njoroge's petition for letter's of administration. The date of the affidavit looks like 11.07.91. It states at paragraph 4 as follows:

"4. That t he deceased died intestate and left the following persons surviving him: -

- a) Esther Wambui Chege - Married***
- b) Margaret Wahu Kamaru – Married***
- c) Wamukore Njoroge – Not Married***
- d) John Mwaura Njoroge – Grandson***
- e) George Chege Njoroge – Granson."***

The affidavit adds that all the above persons were above the age of 18 and were of sound mind.

Paragraph 3 of Wamukore Njoroge's petition before the Thika court states as follows:

"Every person having an equal or prior right to a grant of representation herein has consented her eto (or has renounced such right or has been issued with a citation to renounce such right and apply for a grant of representation and has not done so."

This statement by Wamukore Njoroge has been denied by the petitioner herein and she says her sister

Margaret Wahu Kinuthia did not consent either as alleged by Wamukore Njoroge.

Section 38 of the Law of Succession Act (Cap.160) provides:

“38. When an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

And section 76 of the act is to the effect that a grant may be revoked on such grounds as those urged by the applicant herein. Additionally, rule 7 (7) of the Probate and Administration Rules made under the Act provides:

“7. (7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration in state he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

a) renounced his right generally to apply for a grant; or

b) consented in writing to the making of the grant to the applicant; or

c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

It is the applicant's case that all the foregoing provisions were not complied with by Wamukore Njoroge in obtaining the grant issued by the Thika magistrate's court, hence the present application for revocation of the said grant.

Applicant's counsel informed this court that this application was served by registered post vide which notice was sent on 11.05.04 inviting J. Thongori & Co. Advocates to go for taking of a hearing date but the said Advocates did not attend for the taking of hearing date. As a result, applicant's counsel took 06.10.04 ex-parte as the hearing date. Applicant's counsel added that on 06.10.04 her law firm sent a notice to J. Thongori & Co. Advocates notifying them of 06.10.04 as the hearing date but they again failed to turn up.

Furthermore, applicant's counsel informed the court that although two Advocates acted for Wamukore Njoroge at different times, neither of them found it fit to file any affidavit opposing revocation of the subject grant. Therefore, applicant's counsel urged that the grant to Wamukore Njoroge by the Thika Magistrate's court on 28.12.95 be revoked and that the applicant be awarded the costs of her application.

The statement at paragraph 3 of Wamukore Njoroge's petition cited hereinabove to the effect that every person having an equal or prior right to a grant of representation had consented to the distribution of the estate of her deceased father, Njoroge Gachoho to Wamukore Njoroge's two children has been vehemently denied by the applicant, Esther Wambui Chege before this court. That denial is uncontroverted.

I am satisfied on the evidence before me that the petitioner, Wamukore Njoroge in Thika Senior Resident Magistrate's Court Succession Cause No.262 of 1994 misrepresented or concealed material facts to that court leading to issuance of the subject grant to her. Accordingly, the said grant is hereby revoked. The said Wamukore Njoroge is hereby ordered to pay the costs of this application to the applicant.

Orders accordingly.

Delivered at Nairobi this 21st day of October 2004.

B.P. KUBO

JUDGE