



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO.368 OF 2015

(FORMERLY CHUKA SPM'S COURT SUCCESSION CAUSE NO.220 OF 2013)

IN THE MATTER OF ESTATE OF M'RIMUNYA M'NJAU (DECEASED)

AND

MERCY IGOJI MAINGI.....PETITIONER

VERSUS

LUCY KAREGI KINYUA.....APPLICANT

RULING

This matter relates to the estate of M'Rimunya M'Njau, (deceased) who died intestate in the year 1968. A petition for letters of administration was filed by Mercy Igoji Maingi in her capacity as the daughter of the deceased. A grant of letters of administration was issued by the applicant on 17/1/2014. The estate of the deceased comprised in Land Parcel No. Mwimbi/Murugi/1331. A certificate of confirmation of grant was issued on 8/2/2016. The estate of the deceased, that is land parcel No. Mwimbi/Murugi/1331 was distributed equally amongst Mercy Igoji Maingi, Harriet Mukwanyaga, Harriet Matai and Fridah Karimi.

1. Thereafter, a summons for revocation of grant was filed by Lucy Karegi Kinyua who claims to be a granddaughter of the deceased. The claim by Lucy Karegi is that the petition was filed secretly and the petitioner concealed material facts from the court. It is also her contention that the grant was obtained fraudulently by making of false statements to the court by claiming that the applicant is a beneficiary by virtue of being the wife of the deceased's grandson who grew up in the hands and care of the deceased. The applicant further contends that the petitioner is her mother in law by virtue of being the mother of her husband James Kinyua who disappeared from home and left her with six children. It is also the contention by the applicant that there were two other issues of the deceased namely; Harriet Mukwanyaga Miriti and Jane Kinyua Mathai who rank equally but were not included in the succession and their signatures were forged. The applicant avers that she had placed restrictions on L.R. No. Mwimbi/Murugi/1331 which was lifted without her knowledge and the petitioner is seeking to evict her. The applicant supports her application with an affidavit sworn on 12/6/2018 reiterating the above grounds.

2. In the same application the applicant was seeking an order that an inhibition order be issued restraining any kind of dealings in Land Parcel No. Mwimbi/Murugi/1331 until further orders of this court. She also urged the court to set aside the eviction orders which the court had issued on 4/6/2018.

3. Vide an order of this court dated 3/7/2018 **Justice Limo** issued an inhibition order restraining any dealings on the suit land and ordered the parties to stay where they were currently settled pending the hearing and determination of the application for revocation of grant.

4. In opposing this application the petitioner filed a replying affidavit sworn on 13/7/2018. Her contention is that the applicant is not a dependant of the deceased. Although she admits that the applicant was married to her son James Kinyua, she avers that she deserted the matrimonial home leaving behind her children who are now under her care. She further avers that she gave the applicant a portion of land from her parcel which they occupy. It is her contention that she had no obligation to inform the applicant about the succession as she is not a dependant.

5. The application by the applicant has been supported by Harriet Mukwanyaga and Jane Mathai who are the sisters of the respondent and have sworn affidavit confirming that the petition was filed secretly without their knowledge. They also confirm the averments by the applicant.

6. The matter proceeded by way of 'viva voce' evidence. Parties adduced evidence before Justice Limo. The issue which arises for determination is revocation of grant and distribution of the estate,

Revocation:

7. The law on revocation of grant is anchored at **Section 76 of the Law of Succession Act.**

The section provides:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due

notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or (e) that the grant has become useless and inoperative through subsequent circumstances.”

A court will order a grant issued whether confirmed or not to be revoked if it is confirmed that the petitioner obtained it fraudulently, failed to disclose something material to the case or concealed material facts from the court. A court will also revoke the grant if it has become useless through subsequent circumstance. A grant will also be revoked if the proceedings to obtain it were defective. All circumstances that can lead to the revocation of grant have been well laid down under Section 76 of the Law of Succession Act which is quoted above.

From the evidence laid before me it is clearly demonstrated that the petitioner concealed facts which were material to the case. The petitioner failed to disclose that the applicant lives on the estate of the deceased with her children who were born and brought up on the parcel of land during the lifetime of the deceased. She also failed to disclose that the deceased had other children who were still alive at the time she filed this petition.

8. When the petitioner Mercy Igoji Maingi (DW1) testified she admitted that the applicant is the wife of her son James Kinyua who she said is still alive and lives in Nanyuki. She also admitted that Lucy Karegi, the applicant was living on the estate with her six children. She even told the court that she will give the applicant one acre. This is a clear indication that she had obtained the grant fraudulently by failing to disclose these facts to the court. These facts were confirmed by the witnesses who testified. These are DW3, who testified that the four daughters of the deceased were married and according to the wishes of the deceased James Kinyua was to inherit the entire land parcel in accordance with the wishes of his grandfather. He confirmed that the petitioner is married and lives with her husband who owns three acres parcel of land. DW4 Joseph Muriungi also confirmed that the applicant is entitled to get the estate of the deceased as the petitioner is married and the applicant is the wife of her son. This was also confirmed by DW5 & 6.

I find that the petitioner concealed from the court facts which were material to the case. The grant cannot be allowed to stand as it will disinherit the applicant and her children who live on the estate and had lived there during the lifetime of the deceased. The grant is only good for revocation as it was obtained fraudulently.

Distribution of the estate:

The deceased is said to have died in the year 1968 as per the affidavit sworn in support of the petition for letter of administration, P&A 5. No death certificate was annexed. The **Law of Succession Act** is not applicable by dint of **Section 2(2) of the Act.**

It provides:

“ (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

The law applicable to the estate of the deceased is the customary law of the Meru people.

Customary laws exist side by side with statutory law in that the application of customary law is only applied in so far as the same is not

repugnant to justice and morality. The **Judicature Act (Cap 8 Laws of Kenya) Section 3 (2)** provides,

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

The deceased was from the Meru community. It thus follows that Meru customary practices of inheritance are the applicable law in this case in so far as the same is not repugnant to justice or inconsistent with any written law. According to **Eugene Contran, Restatement of African Law: 2 Kenya II Law of Succession, (Sweet & Maxwell, 1969) at page 30**, the estate of a deceased in Meru and Tharaka community was divided equally among the sons. The position as regards inheritance of daughters is that they generally cannot inherit land. Cotran (supra) was mentioned as an authority in the court of appeal case of ***Mukindia Kimuru & another v Margaret Kanario [2000] eKLR*** where the court noted as follows:

“The sum total of the Meru customary law as regards inheritance of land as set out by Cotran is in his Restatement of African Law, volume 2 at page 8 which reads:

“Daughters are normally excluded, but may also receive a share if they remain unmarried.”

In ***Re Estate of S M N (Deceased) [2018] eKLR***, the court found as follows:

“I am aware that the deceased died in 1972 and that his estate was therefore not subject to the Act which applies to estates of deceased persons who died after 1981 when the Act came into force. Accordingly, the estate was subject to the Meru customs. Under the Meru customs, a brother was entitled to inherit from his deceased brother in the absence of a widow or children (See Eugene Contran on customary law pg.37).”

In the present case, the deceased was survived by four (4) married daughters. Guided by the Meru customs, it follows that the daughters of the deceased are not entitled to a share of his estate as the Ameru is a patrilineal community.

The Judicature Act allows the application of customary Laws where applicable and is not repugnant to justice and morality. See **Section 3(2) of the Judicature Act Cap 8 Laws of Kenya**.

The distribution of the estate of the deceased by the respondent was not based on the law of Succession Act nor was it based on the customary Laws of the Meru. The distribution can therefore not be upheld by this court.

Conclusion:

In the final analysis I find that the summons for revocation of grant has merits. I order that the grant issued to Mercy Igoji Maingi on 17/1/2014 and confirmation on 8/2/2016 is revoked. All the consequential orders are set aside and the estate shall revert to the deceased. Since it is not in dispute that the applicant is entitled to the estate, I order a grant of letters of administration will issue to the petitioner and the applicant. They will then file a summons for confirmation within 30 days.

Dated, signed and delivered at Chuka this 13th day of May 2021.

L.W. GITARI

JUDGE