



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
SUCCESSION CAUSE NO.157 OF 2015
IN THE MATTER OF THE ESTATE OF GLADYS NJERI MURAGURI (DECEASED)

BETWEEN

GADSON WANYOIKE MAINA.....PETITIONER/RESPONDENT

VERSUS

FRANCIS MAINA MWANGI.....OBJECTOR/APPLICANT

RULING

Background

1. The Objector/Applicant vide a Summons for Revocation and/or annulment of Grant under **Section 76 of Cap 160** and **Rule 44** of the **Probate and Administration Rules** dated 12.09.2017, prayed for orders to stay the operation of the grant of letters of administration intestate issued to the Petitioner on 06.05.2016 and to revoke or annul the letters of administration issued intestate for the estate of the deceased (Gladys Njeri Muraguri).

2. The application is based on the following grounds: -

- a) That the proceedings to obtain the Grant of Letters of Administration Intestate of the Deceased were fraudulent as the objector was not included in the institution and continuance of the proceedings herein.
- b) That the Grant was obtained in bad faith as the deceased was survived by the objector as her grandchild and the children of the deceased's son (Objector's father) who is since deceased.
- c) That the petitioner has failed to apply for the confirmation of the said grant, well over a year since issuance.
- d) That the said grant was obtained with the sole purpose of disinheriting the Objectors.

3. It is supported by the affidavit of the Applicant sworn on 13.09.2017. The same reaffirms all the issues raised in the grounds supporting the application. The Objector does however add that the deceased herein had seven grandchildren from her deceased son (Simon Mwangi Muraguri) and that the deceased Gladys Njeri Muraguri left a parcel of land measuring approximately 4.127 Hectares or 10 acres. The Objector further contends that due to the conduct of the Petitioner leaving out and the non-involvement of his siblings, he (Applicant) filed Succession Cause 552 of 2015 (Citation) in Nakuru High Court to compel him to file a succession cause. The Supporting affidavit dated 13.09.2017 by the Objector further states:

- (i) That the Petitioner made it clear that he will not share the deceased's land and the Objector felt disinherited by the Petitioner's conduct.
- (ii) That the Applicant instituted caveat proceedings to safeguard the deceased's grandchildren's interests and be notified when the Petitioner applies for confirmation.
- (iii) That the Petitioner was required to apply for confirmation of the grant to include the Objector and his siblings in the distribution proposal and was to do so not later than 05.05.2017 which is one year since the grant was issued on 6th May, 2017.
- (iv) That the Petitioner has not done so.

(v) That the Objector prays for the grant issued to the Petitioner be revoked for failure to apply for confirmation as required and instead a fresh grant be made for purposes of completion of the succession process.

4. In opposing the said application, the Petitioner/Respondent, Gadson Wanyoike Maina, filed a Replying Affidavit sworn on 23.07.2018. He states that he opposes the application on the following grounds: -

(i) That the Applicant is his late elder brother's son who brought the application on behalf of himself and his sibling.

(ii) That the deceased herein Gladys Njeri Muraguri was his mother and he was issued with Letters of administration intestate on 6th May, 2016 as per annexure 'GWM 2'.

(iii) That Gladys Njeri Muraguri was the registered proprietor of land parcel GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) measuring 4.127 Hectares. And annexes GWM 3 a certificate of official search.

(iv) That at issuance of the grant of letters of administration intestate there was no concealment of material facts on his part.

(v) That the failure to apply for the confirmation of grant of letters of administration was occasioned by the fact that Objector/Applicant had filed another Succession cause (552 of 2015) which he opposed via Replying Affidavit dated 21.09.2015).

(vi) That, Gladys Njeri Muraguri, the deceased had five (5) children, namely Simon Mwangi Muraguri, Grace Wangui Ngigi, Lucy Nyokabi Maina, Gadson Wanyoike Maina and Josephine Wangari Kariuki and two pieces of land, namely **GILGIL/KARUNGA BLOCK 1/114 (KASAMBALA)** and **GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI)**.

(vii) That the deceased herein Gladys Njeri Muraguri directed in the year 2012, the year of her demise that Simon Mwangi Muraguri should occupy GILGIL/KARUNGA BLOCK 1/114KASAMBALA also known as Delamere land measuring 40 acres and that the Petitioner takes GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) also known as Langa Langa land.

(viii) That the Petitioner has been living on GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) for more than 20 years even before the demise of Gladys Njeri Muraguri.

(ix) That the Petitioner, Simon Mwangi Muraguri, now deceased and the deceased herein, agreed vide an agreement dated 25.05.2000 that the Petitioner would occupy GILGIL/KARUNGA BLOCK 10/5 (GATHIGIRIRI) and Simon would take GILGIL/KARUNGA BLOCK 1/114 KASAMBALA.

(x) That the Petitioner herein agreed with his late brother Simon Mwangi in the presence of the deceased, Gladys Njeri Muraguri and her daughters and their husbands that Simon would not interfere with GILGIL/KARUNGA BLOCK 10/5 (GATHIGIRIRI) and neither would the Petitioner interfere with GILGIL/KARUNGA BLOCK 1/114KASAMBALA which agreement was also known amongst the elders.

(xi) That as the surviving son of the deceased Gladys Njeri Muraguri, the Petitioner had first priority to apply for grant of letters of administration in the belief that he was wholly entitled to Land Parcel No. GILGIL/KARUNGA BLOCK 10/5 (GATHIGIRIRI) and thus there was no concealment nor was there failure to disclose any material facts.

(xii) That at the time of filing the succession cause herein it was the honest belief of the Petitioner that he was not required to include his late brother nor his children as per the agreement. That his late brother would not be entitled to GILGIL/KARUNGA BLOCK 10/5 (GATHIGIRIRI).

(xiii) That the Petitioner herein opposes the revocation of grant and/or the annulment of the grant of Letters of Administration intestate issued to him on 06.05.2016 as he opines no sufficient grounds have been produced. That instead, the court should confirm the said grant of letters of administration.

5. The Objector put in a Further Affidavit in Support of the Summons for Revocation wherein he avers that:

(i) That his non-involvement as stated by the Petitioner is factual thus evidencing fraud. That the same persisted despite of him (Petitioner) filing a response to the Citation dated 21.09.2015 whereas the Petition was filed later on 29.09.2015.

(ii) That the allegation that the deceased Gladys Njeri Muraguri owned GILGIL/KARUNGA BLOCK 1/114KASAMBALA is not true; that instead the land was acquired by the deceased's son Simon Mwangi Muraguri, also deceased, through his efforts whilst working as a plumber in Delamere estates.

(iii) That the late Simon Mwangi Muraguri paid share capital with fellow workers who formed KASAMBARA FARM in the mid-sixties and paid for shares which resulted in his acquisition of share certificates and subsequently land evidenced by some receipts, and a copy of one of the share certificate, surveyor receipts, an allocation letter and a copy of the title deed issued in 1986 in relation to GILGIL/KARUNGA BLOCK 1/114KASAMBALA.

(iv) That it is preposterous for the Petitioner to claim that the land belonged to the deceased Gladys Njeri Muraguri against this backdrop and to purport that it was given to the late Simon Mwangi Muraguri by the deceased herein.

(v) That the deceased Gladys Njeri Muraguri only had one piece of land which was to be shared among her children which she had acquired from her husband as per the family agreement made between her and her co-wife on 21.12.1991.

(vi) That from the foregoing, the Petitioner could not have made the said agreement for the distribution as alleged by the Petitioner, which agreement is devoid of signatures of the Petitioner, Simon Mwangi Muraguri, deceased Gladys Njeri Muraguri and the rest of the Petitioner's siblings, Petitioner's wife and Petitioner's sister's husband who were allegedly present and witnessed the signing.

(vii) That the Petitioner has only developed one side of the land and is not in full possession of, or developed, the entire land and that he is only being opportunistic. That this fact is attested by the photographs exhibited of the layout of GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) on google satellite clearly showing that the Petitioner has only developed a portion of the land, more so where his house is located.

6. The Objector further put in a Supplementary Affidavit in support of Summons for revocation dated 18.06.2019 averring that the petitioner herein has developed only his side of GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) and alleges misrepresentation of facts when the Petitioner states that he had developed the whole piece of land whereas 5 acres remain intact. He demonstrated this by a photograph marked as annexure FMM11.

Submissions

7. The application was canvassed by way of filing written submissions. The Objector is represented by the law firm of P.K. Njuguna Advocates while the Petitioner by D.K. Gichuki & Co. Advocates.

Objectors/Applicant's submissions

8. The Objector's submissions are dated 16.04. 2021. He Objector contends that the proceedings obtaining the grant of letters of administration dated 06.05.2016 were fraudulent as they did not involve him and his siblings and are laced with material non-disclosure of the allegation that the Objector and his siblings are also beneficiaries which he moots as the reason the Petitioner failed to apply for confirmation.

9. He submits that Simon Muraguri, his father and (elder brother to the Petitioner herein) is a son to the late Gladys Njeri Muraguri whose estate is the subject matter of these proceedings and who also had daughters but were not involved in proceedings. The late Gladys Njeri Muraguri left one parcel of land measuring 4.127 hectares.

10. He adds that Gladys Njeri Muraguri's eldest son, the late Simon Mwangi Muraguri had bought, developed and settled his family on GILGIL/KARUNGA BLOCK 1/114 (KASAMBARA)- measuring 11.6 hectare and adduced documents showing acquisition and subsequent title obtained in 1986.

11. The Objector submits that the Petitioner herein falsely stated that two properties were left by the late Gladys Njeri Muraguri one each to be taken in the fashion of the agreement dated 25.05.2000. He states that the true position is that there was only one property of the deceased which was to be divided among the two brothers, evidenced by the conduct of the Petitioner who left a section of the land undeveloped prior to the death of Simon Mwangi Muraguri and as further evidenced by satellite imagery showing development of only half of the land. He submits that the Petitioner began developing the other half of the land when he (Objector) confronted him after which he (Petitioner) started claiming the entire parcel of the land.

12. That by the conduct and utterances of the Petitioner, the Objector filed **Nakuru High Court Succession Cause No.552 of 2015 (Citation)** which ordered the Petitioner to file a succession cause in 30 days. It is then that material disclosure was eminent that he petitioned for grant of letters of administration without involving the children of his late brother, who were beneficiaries, their father having died.

13. The Objector relied on Section 51(2)(g) of the Law of Succession Act which stipulates that children of a principal beneficiary ought to be listed as beneficiaries as was held in **Re Estate of Festo Akwera Kusebe (Deceased)[2019] eKLR** where the administratrix conceded that she did not disclose the children of a close relative and was found to be in non-compliance with Section 51 (2) (g). Further reliance was placed on the case of **Re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR** where Musyoka, J held that non-disclosure was a ground for revocation for grant issued on 06.05.2016.

Petitioner's submissions

14. The Petitioner generally stated who the Objector is in relation to the Estate **Gladys Njeri Muraguri** as being the grandson of the late Simon Mwangi Muraguri who was his brother.

15. The Petitioner avers that the Objector had alleged that he and six other siblings were to get a portion of GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) -4.127 hectares which aversion was opposed by way of a replying affidavit dated 23.07.201 to which he annexed a copy of the grant of the letters of administration of the estate of Gladys Njeri Muraguri, his mother in respect of the said parcel of land.

16. The Petitioner contends that his failure to have the grant confirmed was occasioned by a Citation filed by the Objector vide Succession cause 552 of 2015. That he opposed the Citation in which he stated that his deceased mother had indicated that that his deceased brother Simon Mwangi Muraguri would take parcel No. GILGIL/KARUNGA BLOCK 1/114 (KASAMBARA) while he was to take parcel No. GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) measuring 4.127 hectares (about 10 acres). That this position was further agreed upon between himself and his deceased brother Simon Mwangi Muraguri. He annexed the written agreements as GWM 5 (a) and (b) respectively.

17. The Petitioner added that the said agreements were witnessed by his sisters and brothers in law and as the surviving son of the late Gladys Njeri Muraguri was entitled wholly to GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) and as such is free from the allegation of material non-disclosure. More importantly was that neither he nor his deceased brother and his children would interfere with the quiet possession of each other's land. It was his submission therefore, that the Grant of Letters of Administration should not be revoked.

Analysis and determination

18. After considering the respective submissions as well as the law and the evidence adduced, I have concluded that the issues for determination are;

- (a) Did the land GILGIL/KARUNGA BLOCK 1/114 (KASAMBARA) - comprise of the estate of Gladys Njeri Muraguri?*
- (b) Did the alleged agreement between the petitioner, the late Simon Mwangi Muraguri and the deceased herein have legal effect to the point that the deceased's property ought to vest as alleged?*
- (c) Was the agreement of 25.05.2000 a Will or a basic agreement?*
- (d) Should the Grant of the Letters of Administration be revoked?*

19. The Petitioner herein alleges that the late Gladys Njeri Muraguri left her estate to be apportioned in the distribution of in an agreement dated 25.05.2000 as follows:

- (a) GILGIL/KARUNGA BLOCK 1/114 (KASAMBARA)--11.6 hectares to be left to Simon Mwangi Muraguri
- (b) GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) 4.127 hectares to be left to Gadson Wanyoike Maina.

20. The Petitioner alleges that by way of an agreement between himself, the late Simon Mwangi Muraguri and the late Gladys Njeri Muraguri he petitioned for a grant of letters of administration over parcel No. GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) on 06.05.2016 which he exhibited as annexure GWM2 as well as a copy of official search as GWM3.

21. From the record, the Petitioner has adduced an alleged agreement in Kikuyu language dated 25.5.2000 and translated in English as annexures GWM-5(a) & 5(b) respectively. The Petitioner alleged that the agreement had the effect that neither himself nor the late Simon Mwangi Muraguri would claim the others property. He alleges that this agreement was witnessed by the late Simon Mwangi Muraguri, their sisters and their respective husbands and elders who knew how the deceased wanted her estate to be distributed.

22. In the High Court in **Ratilal Gova Sumaria & Another -vs- Fina Bank Limited & 3 Others, Nairobi HCCC No.44 of 2002 (2005)e KLR** the court noted that a consent acts as an estoppel. However, it can be set aside on any ground which would invalidate an agreement such as misrepresentation, fraud or mistake.

23. A party may also revert to **Rule 73** of the **Probate and Administration Rules** which gives the court the inherent powers to make such orders as may be necessary for ends of justice to be met or otherwise to prevent the abuse of the court process.

24. In the recent English Court of Appeal decision of **Reville Independent LLC v Anotech International (UK) Ltd [2016] EWCA Civ 443** the court was of the proposition that even a draft agreement which is signed has a binding effect and force. It was stated that:

“... a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly”.

25. The fact is that the alleged agreement in the Kikuyu language has not been signed by any of the parties it is said witnessed it, namely, the Petitioner, the late Simon Mwangi Muraguri and the deceased herein. It also does not list the children of the deceased Gladys Njeri Muraguri.

26. Interestingly, The English translation has been signed by seven individuals which makes it suspicious at the least. It can only be deemed as expeditious at best as it purports to dispose of the property which makes it appear like a Will.

27. On the formal requirements of validity of a Will, **Section 11** of the Law of **Succession Act** states -

“11. No written will shall be valid unless-

- i. (a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;*
- ii. (b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;*
- iii. (c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or*

have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

28. The agreement fails as a Will as the subject matter on the title is an agreement between the Petitioner herein and the late Simon Mwangi Muraguri and not between the deceased herein and her sons, being the late Simon Mwangi Muraguri and the Petitioner herein. Further, the would be testator Gladys Njeri Muraguri does not appear to have signed the Kikuyu version yet her thumb print is alleged to be on the English version.

29. The ‘Aira’/witnesses in the Kikuyu copy are neither identified by name, National identity card numbers nor signatures alongside their names. The converse is the case with the English version which appears properly attested by five witnesses. This casts doubt as to the authenticity of the alleged agreement or at best any Will left behind by the deceased herein.

30. It is also notable that the persons alleged to have witnessed the English version of the agreement were not called to swear any affidavit to confirm the contents of the agreement or that they witnessed the same. Further, even the late Simon Mwangi Muraguri who is said to be a party to the agreement did not sign it. This definitely casts doubt as to the origin of the agreement and the intention of the making of it.

31. A further question to be asked is: Why is it that only a search certificate of the contested land GILGIL/KARUNGA BLOCK 10/5(GATHIGIRIRI) has been availed by the Petitioner showing that Gladys Njeri Muraguri is the proprietor and not GILGIL/KARUNGA BLOCK 1/114 (KASAMBARA), yet the Petitioner claims that both were the properties of the late Gladys Njeri Muraguri? This again is a question which the court cannot assume or take lightly. It speaks volumes that the Petitioner concealed material facts which the court will require a further interrogation of. In so holding, I find solace in the case of **Kenneth Nyaga Mwise v. Austin Kiguta & 2 Others [2015]** where the Court of Appeal held that:

“...In the present case, there are material differences in the typed proceedings of the court marked as “MF1 2.” These differences needed a witness to explain the authenticity of the handwritten photocopy, this could only be done of the document marked for identification as “MFI 2” were produced in evidence as an exhibit by the maker or any other competent witness.”

32. The total sum of the above analysis is a clear testament that the Petitioner did not pass the test that ‘*he who alleges must prove*’ as provided for under **Section107** of the **Evidence Act** that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

33. From the analysis of the above facts, I am persuaded to believe that the Petitioner failed to disclose material facts that the Objector and his siblings were entitled to a share of the land to which the Petitioner was issued with a grant of letters of administration. Furthermore, the Objector was able to demonstrate that his deceased father had bought the KASAMBARA land on which he settled his family. He adduced receipts dating as early as 1965 to the latest being in 1978 showing that his late father, Simon Mwangi Muraguri paid for shares in the farm after which Share Certificates were issued in his name. He further demonstrated that his late father paid surveyor’s fees to Messer’s Olweny & Associates for which receipts dated 21/10/1977 were issued.

34. Lastly, the Objector has adduced a tile deed bearing the title number land GILGIL/KARUNGA BLOCK 1/114 (KASAMBARA)- to evidence its proprietorship details as belonging to Simon Mwangi Muraguri which evidence has neither been controverted nor challenged. This proprietorship did not devolve through a probate and administration cause, thus demonstrating misrepresentation of facts that this land belonged to the deceased herein.

35. **Section 76** of the **Law of Succession Act** Provides that;

“A grant of representation whether or not confirmed may at any time be revoked or annulled at any time if the court decides either on Application by an interested party or of its own motion that the grant was obtained fraudulently by the making of a false statement or by the concealment from court of something material to the case”.

On the whole therefore, it is clear that the Petitioner may have obtained the Grant fraudulently by concealing material facts as outlined above consequent which this application ought to succeed. I therefore hold that the grant of letters of administration intestate issued to the Petitioner on 6th May, 2016 be and is hereby revoked. Parties shall take dates for the hearing of the objection proceedings to determine the extent of the estate of the deceased and who are the beneficiaries entitled to a share of the same. The Objector shall be entitled to the costs of this application.

DATED AND DELIVERED AT NAIVASHA THIS 11TH NOVEMBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. P.K Njuguna for the Objector/Applicant.*

2. *Mr. Gichuki for the Petitioner/ Respondent.*