



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 486 OF 2001

IN THE MATTER OF THE ESTATE OF THE LATE CHARLES MURAGURI KUGURU

VMM

EWM

CWN

DKM.....APPLICANTS

VERSUS

VIRGINIA MUMBI KUGURU

SIMON KUGURU.....RESPONDENTS

JUDGEMENT

1. The applicants summons for revocation of grant dated **24th June 2018** prays that the grant issued in favour of the respondents herein be revoked on the grounds that the applicants were minors when the Summons for Confirmation of Grant was heard and the certificate issued. That further, the same was issued fraudulently as there was concealment of material facts that the deceased had a 2nd wife and children.
2. In their supporting affidavit the applicants averred that the Certificate of Confirmation of Grant in this case was issued on **21st November 2002** and on **28th April 2005** their mother applied that the Grant be annulled for the reason that the Grant and the Confirmation were obtained through fraud and non-disclosure of material facts. That further, by a Consent Order issued on **15th July, 2005** the parties agreed to have their mother file an Objection and Cross-Petition for Grant of Letters of Administration Intestate and have both the objection and the application heard together.
3. The applicants averred further that their mother duly filed the Objection and Cross-Petition but she passed away on **29th July 2014** before the same could be heard and determined. Further, that the restrictions were registered against all the 3 pieces of land comprising the estate of the deceased as per the Court Order of 15th July 2015. It is averred that the deceased was father to the applicants who are aged 31, 28, 26 and 22 and were minors at the time of confirmation and could not therefore file their affidavits of protest. That also the deceased married their mother as a 2nd wife under Kikuyu Customary Law in the year 1995.
4. On their part the respondents vide the replying affidavit sworn by the 1st respondent on 23rd August 2018 opposing the application on the grounds that the deceased Rosemary was not a wife of the deceased Charles Muraguri Kuguru as there was no customary rites nor any legal processes that were undertaken by the two proving that she was a wife. That therefore at best the late Rosemary could only pass as a girlfriend of the deceased. The 1st respondent added that 1st applicant was not and has never been a son of the deceased because Rosemary (deceased) in her affidavit sworn on 7th November 2011 in paragraph 9 clearly states she got a child with the deceased Muraguri on 25th August 2000 but the child passed away in July 2001.
5. The 1st respondent deposed further that the 1st applicant, his brothers and sisters are strangers who did not even attend her husband's (the deceased) funeral and are only interested in claiming his property. She deposed further that there is nothing that could have prevented Rosemary Wanja in disclosing in her affidavit that the 1st applicant, his brothers and sisters were children sired by the deceased Charles Muraguri. In conclusion, she deposed that the applicants' application for Revocation of grant be dismissed.

6. When the matter came up for directions the court ordered the same to proceed by way of oral evidence.

7. The 1st applicant **VMM (PW1)** adopted as evidence his statement filed on 26th February 2019 and testified that the other applicants are his brothers and sister in law. He continued to testified that they filed summons dated 4th June, 2018 seeking revocation of the grant as well the confirmation of the grant. He testified further that the deceased was their father and was introduced to them by their mother in 1996 when he was then 11 years old.

8. He added that their mothers' name was Rosemary Muraguri and she died in July 2014. He continued to testify that in 1996 they moved to **Melangine plot No. 613** which had one semi-permanent and permanent house where they lived with their mother and the deceased. That the deceased died on 6th March 2001 and before then they had a peaceful and happy life. He added that the deceased provided them with food, clothes and shelter.

9. **PW1** continued to testify that the deceased was a matatu driver and that they had learned that he had another family at Wanyonyoro who were the respondents herein. He testified that they had met them as they used to come to Melangine. He testified further that the 1st respondent was the deceased first wife and the 2nd respondent their son. After their father's death they continued to live at the land up to date and that one of his sibling died in Meru in 2001. He went on to state his siblings are Erick Muraguri, Caroline Waitheera and Dennis Muraguri who was born in 1995 and named after their paternal grandfather William Muraguri. He added that they were not included in the petition. He produced photos, birth certificates and their deceased's sister health card as documentary evidence.

10. On cross-examination the 1st applicant confirmed that they moved to Melangine in 1996 and he was 11years old while the 2nd applicant was 6 years old. He went on to state that he did not know who he was named after and that the 2nd applicant who was born in 1990 is named after the deceased. He stated that at Shamata he schooled with his other siblings except for the 4th applicant who was one-year-old.

11. The 1st applicant stated further that he joined secondary school in Melangine and at the time their mother was a housewife. However, after the deceased death their mother was not indicated as a wife. That also the burial arrangements were done at Wanyororo but neither him nor any of his siblings attended the said preparation as he was in boarding school.

12. Still at cross-examination the 1st applicant identified the people in the photo evidence he produced in court and confirmed that the birth certificates had been obtained after filing the present suit. He stated that their mother was a second wife to the deceased and he knew the first family as they used to come and visit them in Melangine. He confirmed that paragraph 9 of the affidavit sworn by their deceased mother indicated that her marriage to the deceased was blessed with one child Joy Wambui who passed on.

13. Upon re-examination, the 1st applicant stated that he was familiar with the naming of children in Kikuyu. That he was named after his maternal grandmother and so was the 3rd applicant, the 2nd applicant after their maternal uncle and the 4th applicant was named after their paternal grandfather. He went to state that both homesteads hosted the burial.

14. **PW2 DKM** adopted as evidence his witness statement filed on **26th February 2019** and testified that he was born on 8th November 1995 in Nyandarua County. He stated that the deceased was his father and his mother the late Rosemary Wanja Muraguri. He added that he was 6 years old when the deceased died on 6th January, 2001 and that they had a close relationship. He stated further that they lived on plot no. 613 at Melangine together with the deceased and his mother.

15. The 2nd applicant went on to state that the deceased used to provide them with everything they needed and that when he died he was buried in the plot where they lived. He stated that he attended the deceased burial together with his deceased mother and sister. That there was a photo of him, his deceased mother, his aunt and neighbors. He stated further that he had a birth certificate and his surname was Muraguri. He added that the deceased, his deceased mother and his sister were buried in one plot.

16. The 2nd applicant went on to state that he knew the first family and that they had interacted and had a good relationship. That plot Melangine 613 was approximately 8 acres and they cultivated half of it and the other half was cultivated by their step mother up to date. He stated further that they respondents deliberately left them out of the petition.

17. On cross-examination he stated that he started school in Melangine and that their mother was an assistant chief before her demise. He stated further that his birth certificate together with the ones was for the 3rd applicant was obtained on 23rd March 2014. He confirmed that their mother's name on the identification card issued on 10th January 2004 was Rosemary Wanja Muraguri.

18. The respondents called 3 witness in support of their case.

19. **DW1 VMM**, adopted as evidence her statement dated 8th November, 2018. She testified that she was married to the deceased in the year 1963 in a Kikuyu Customary marriage and they had 8 children. She stated that they lived in Nakuru and the deceased used to work for KCC. That they moved to Wanyororo and purchased land in Bahati/Nyandarua/613 in 1981.

20. DW1 testified further that the deceased died on 6th March, 2001 and buried in Melangine/613. She added that she planned for burial with her family and that the members of her family were present including her father in law William Kuguru. She went on to testify that she did not know Rosemary Wanja the objector herein and that she was nowhere during the burial and was not mentioned as the widow in the daily nation newspaper advertisement.

21. She stated that she was called by her neighbor concerning a burial issue and she called her family and they filed case in court. She added that the deceased did not tell her that he had married another wife and that the objector herein called herself Rosemary Wanja Muraguri.

Further, that she had been buried where the deceased had been buried. She stated that she did not know Vincent Muturi Mwaura and that the deceased did not tell her of a child Mercy Wachuka. She went on to testify that when the deceased retired he bought a matatu and would go to the said land depending on his timings. DW1 produced the following documents in support of her case, namely, newspaper advert produced as Exhibit D1, Court order dated 4th August 2014-Exhibit D.2, Rosemary Identity Card – Exhibit D3.

22. On cross examination she stated that she lived in Wanyororo and that they bought together with the deceased land parcel Melangine/613 in 1981. That there was a permanent house and one for the worker and the deceased would spend the night there as well. She stated further that in 2017 they demolished the permanent house so that they could build elsewhere, but they were charged with malicious damage to property. She added that nobody was living in that house neither her nor her children. She confirmed that the objector used the other portion and somebody lived in the smaller house but she did not know who it was.

23. DW1 confirmed that there was a committee planning for burial of the deceased in her house and friends were meeting Melangine/613. She confirmed from the family photographs taken during the funeral that she could see herself, the deceased's brother and Rosemary holding a child. She stated that after the funeral they went back to Wanyororo and left the grave at Melangine/613. She added that she had not heard if the deceased had another wife and children and that Rosemary died in 2014. She stated that her father in law was called Kuguru and that she did not know Denis Kuguru or about his birth certificate. She stated further that she filed a case to stop the burial of Rosemary and the court gave some order but she was however buried there.

24. **DW2 SAMWEL MURIUKI KUGURU** the deceased elder brother, adopted as evidence his witness statement dated 8th November 2018. He testified that he knew DW1 since 1962-63 and that she was married to the deceased, lived in Nakuru and had children. That the deceased died in 2001 and was buried in his Ndondori farm.

25. He stated that the deceased married under customary marriage which was organized by his father and relatives and they went to see DW'S 1 parents. That dowry (money) was paid.

26. **DW2** went to state that he participated in the funeral arrangements and postmortem was carried out. He stated that no other person came and claimed to be the deceased's wife and that he had heard about Rosemary when she was to be buried at his brother's farm. That they had obtained a court order to stop the burial but later he learnt she was buried there. He stated further that the deceased didn't tell him of another wife or children.

27. Upon cross-examination he stated that he was very close to the deceased and he lived in land parcel no. 613 where there were 2 houses, a permanent and semi-permanent. That he had gone back to that land many times and did not find anybody living in that house. He stated that the big house was demolished by DW1 in 2017 as nobody was ready to live there. He confirmed that DW1 had 8 children and that the deceased ran a matatu business after retirement. He stated further that the deceased would stay in Melangine/613 or his home and he did not have another family.

28. He confirmed that their father's name was William Kuguru and that he could see certificate of birth for Denis Kuguru the 4th applicant which indicated that the mother was Rosemary Wanja Muraguri and the father was Charles Muraguri Kuguru (the deceased). He added that there was a grave of a child whom he did not know on Melangine/613 and that it was not the DW1's child. He confirmed that he could see himself, DW1 in the photo shown to him in court and that he did not know the lady holding a child.

29. **DW3 IVINE WANJIRU** adopted as evidence her witness statement dated 8th November, 2018 and testified that she knew the deceased as he was her elder brother. She stated that the deceased lived in Nakuru and had a wife called Virginia Muraguri and they had 8 children. She went on to state that the deceased did not tell her of another wife yet she was close with him. She added that there was someone taking care of the cows in Melangine /613. She stated further that the deceased's death was advertised in the newspaper but nobody came and complained. That she heard of Rosemary in 2014 when she was told by DW2 that someone was intending to be buried there and that she learnt later Rosemary was buried there. She added that she did not get to know Rosemary or her son Dennis Kuguru the son of Rosemary and that no child came up to say that they were the deceased's children.

26. The court directed the parties to file written submissions which they have complied.

Applicants' Submissions

27. The applicants in their submission identified three issues for determination; firstly, **whether the applicants are children of deceased for purposes of succession**. On this issue the applicants submitted that they were indeed the children of the deceased for purposes of succession and that the deceased had recognized and accepted them as his own children. That he deceased provided for their needs for more than 5 years and he had voluntarily assumed permanent responsibility over them. The applicants stated that they lived in the deceased Melangine parcel No. 613 even after the deceased's and their mother's death. That further, they had produced birth certificates of the 2nd and 3rd applicant indicating that the deceased was their father. They draw the court's attention to the provisions of **Article 27 (1), (4) and (5) of the Constitution of Kenya; section 3(2) of the Law of Succession Act; the case of Mubea vs Mubea CACA No. 76/1980 (unreported) and Re estate of JCG (deceased) [2018] eKLR.**

28. On the second issue, **whether the grant was obtained by non-disclosure or concealment of material facts or information**, the applicants submitted that this court has jurisdiction pursuant to **section 76 (b) of the Law of Succession Act** to at any time revoke a grant whether or not confirmed if the same was obtained fraudulently by making of a false statement or the concealment from the court of something material. That in the present case in the petition filed on 10th October 2001 the petitioners failed to list the applicants as children of the deceased yet they knew that the deceased had taken them as his children and lived with them in his land parcel No. 613 Melangine.

29. Lastly, **on the reliefs that court should grant** they urged the court to revoke the grant of letters of administration Intestate issued to the

respondent on 18th January, 2002 and set aside the Certificate of Confirmation issued on 21st November, 2002. They further urged the court to issue a fresh grant of letters of Administration Intestate jointly to the petitioners and 1st applicant.

Respondents Submissions

30. The 1st respondent identified three issues for determination; firstly, **whether the deceased Charles Muraguri Kuguru had married Rosemary Wanja**. She submitted that the deceased Rosemary Wanja never produced any evidence to show that she was married to the deceased. The 1st respondent submitted further that none of the witness who testified called any elder from their mother's side or their father's side or Rosemary's brothers or sisters to verify that customary marriage took place.

31. The court's attention was drawn to **Eugene Cotran "a casebook on Kenya Law" at page 30** where it sets out the essentials of a Kikuyu Customary marriage which entail; parties' capacity to marry, consent to union, slaughtering of the Ngurario ram and ruracio (dowry payment). The 1st respondent submitted that there was no evidence of consent of union and dowry payment hence no valid Kikuyu Customary marriage took place.

32. She placed reliance on the case of **Gituanja vs Gituanja [1983] KLR 575** where the court held the existence of marriage is a matter of fact which is proved with evidence and under the Kikuyu customary law was evidenced by the slaughtering of the Ngurario.

33. Secondly, **whether the four children not sired by the deceased have any right of inheritance over property acquired by another spouse**. The 1st respondent submitted that the 1st applicant's birth certificate indicates that his father is one Francis Ngugi Shangari. She added that the birth certificate of the 4th applicant which was issued during the subsistence of this suit indicating that the deceased as his father, that the same contradicts the affidavit of their deceased mother sworn on 7th November, 2011 where she stated that she came into the marriage with four children.

34. She went on to state that the birth certificates of the 2nd applicant and 3rd applicant were registered long after their deceased father death. That the only child the applicant's deceased mother alleges was sired by the deceased allegedly passed away. The respondent submitted that the applicants did not produce any evidence to show that they were maintained or supported by or lived with the deceased. She draws the court's attention to **section 29 of the Law of Succession** which defines who dependants are and the case of **Jane Nyambura Ndungu vs Beatrice Wangari Ngungu, Tabitha Wairimu Ndungu & Lucy Nyambura Ndungu (Civil Appeal No. 305 of 2018)**.

35. Lastly, **on the issue whether summons for revocation of grant are valid or should the issue of distribution be the only valid issue to be dealt with**, the 1st respondent while placing reliance in the Matter of **The Estate of Wilson Wamagata (Deceased) Nairobi High Court Succession Cause Number 261 of 1998, Re Estate of Gitau (Deceased) 2002 KL 43, Re Estate of Gitau (Deceased) 2002 KLR 434 and Estate of John Kamau Gichuki (Deceased)** urged the court to find that this is not a proper case for revocation or annulment of the grant.

ANALYSIS AND DETERMINATION

36. Having perused through the pleadings, the evidence adduced in court and the submissions, the following issues arise for determination; firstly, **whether the applicants qualify as dependants of the deceased** and secondly, **whether the applicants have met the threshold for revocation of a grant**.

37. On the issue of **whether the applicants qualify to be dependants of the deceased**. Section 26 of the Law of Succession Act provides as follows: -

For the purposes of this Part, "dependant" means—

a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

38. The court in **Beatrice Ciamutua Rugamba .v. Fredrick Nkari Mutegi & Others, Chuka Succ. Cause No. 12 of 2016** held as follows: -

"From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

39. In the instant suit, I note that the applicants produced birth certificates indicating that the 1st applicant's father was one Francis Ngugi Shangari while the 2nd, 3rd and 4th applicants the deceased. I further note that the birth certificates of the 2nd and 3rd applicants have dates of birth which are approximately 10 months apart. This is in my view raises questions as to how the same were obtained and the validity of the entries therein. It appears that the same were specifically prepared and tailored to suit these proceedings.

40. Further the applicants' mother in an affidavit dated 7th November, 2011 sworn before her demise, averred that the marriage between her and the deceased was blessed with one child by the name Joy Wambui born on 25th August 2000 but later passed on in July 2001. Where then does the applicants who were born by the said Rosemary obtained the details they passed to the registrar of births and deaths when preparing the above birth certificates? If anything it was their late mother who ought to have obtained and even if she was to do so she would not have indicated the deceased as the applicants father considering her averments in the above cited affidavit.

41. In view of the above, it is my finding that the said averments put doubt on the authenticity of the said certificates of the birth. Further, the said averments are a confirmation that the applicants were not the deceased's biological children. In addition, the applicants have not provided any evidence of how the deceased maintained them and the responsibility he undertook over them as they claimed.

42. Although they claimed that the deceased took care of them in providing food, schooling among other amenities there was no direct or circumstantial evidence to proof such. There was nothing from any school in form of documentary or least of all oral evidence that the deceased presented himself as a parent to any of the applicants. Neither was there any evidence of a neighbor or such family friend to buttress the applicant's allegations of such relationships.

43. There was the production of several sets of photographs depicting various scenes. This in my view is merely persuasive. Photographs can be taken anywhere by any persons interested. Some are known to be taken sometimes for ulterior motives. Any production of the same must be supported by cogent evidence. In this case they did not convince this court.

44. Their deceased mother as clearly submitted by the respondents was not married under kikuyu customary law. Although she alleged that some money was taken to her parents in 1997 and 1999 as per her affidavit sworn on 7th November 2011, the same remained hearsay as no other witness testified to that effect. There was no independent witness from either sides. Customary marriage as Cotran found above must at least be backed up with strong evidence especially oral as they usually participate or are generally present during the exercise.

45. On the issue **whether the applicants have met the threshold for revocation of a grant. Section 76 of the Law of Succession Act** 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”.

46. The court in the case of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] eKLR** at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows: -

“The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (emphasis added.)

47. In the affidavit in support of petition for letters of administration intestate filed by the respondent on **19th October, 2001**, the respondents indicated that the deceased was only survived by the 9 nine dependants. This position was reiterated in the affidavit in support of summons for confirmation of grant. This court does not find that the respondent concealed any material evidence when applying for this grant. The applicants were and are not deceased children. If there was any relationship with their late mother, then it was purely an illicit affair but not a known marriage.YU

48. If at all they reside at Melangine parcel of land, although there was no proof of such, then it was at the volition of the deceased. If they

have any right or claim over the said land the same should be litigated elsewhere and not in this cause.

49. In the premises, this court does not find the objection meritorious at all. The interment of the objectors remains in the suit land **NYANDARUA /MILANGINE /613** whether by design or otherwise does not make her the deceased wife for all intent and purposes.

50. The objection proceedings are hereby dismissed with no order as to costs. All the restrictions placed on the parcels of land as per the orders dated 15.7.2005 are hereby lifted.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 14TH DAY OF DECEMBER 2021.

H K CHEMITEI.

JUDGE