



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CASE NO. 501 AND 502 OF 2004

(IN THE MATTER OF THE ESTATE OF JOAN WANJUGU GITHINJI (DECEASED))

1. RICHARD MAINA GITHAE

2. MWANGI GITHAE.....APPLICANTS

-VERSUS-

ANN WAMUYU BAARU.....RESPONDENT

JUDGMENT

This judgment is in respect of two summonses for revocation of grant dated 16 October 2004 filed by the applicants who sought to revoke the grant of letters of administration intestate made to the respondent in respect of the estates of Joan Wanjugu Githinji alias Joan Muchugu (Joan) and her husband Githinji Maina (Githinji) in Karatina Resident Magistrates' Succession Causes No. 42 of 1999 and No. 43 of 1999 respectively.

Joan died on 9 November 1997 while her husband died earlier, more particularly on 26 December 1985; they both hailed from Mathaithi in Nyeri county and were domiciled in the Republic of Kenya.

On 22 June 1999 the respondent petitioned for grant of letters of administration intestate of their respective estates, as noted, in two separate succession causes at the resident magistrates' court at Karatina. In the affidavits in support of the petitions, she described herself as the daughter of the deceased and their only survivor.

Based on this information the respondent obtained the grant in respect of the estate of Githinji on 12 April 2000; it was subsequently confirmed on 31 January 2001 and with that, Githinji's entire estate made up two parcels of land, that is, Title No. Konyu/ Baricho/183 and Title No. Magutu/Ragati/2 devolved upon her absolutely.

The grant for administration of the estate of Joan was obtained and confirmed on the same dates as that of Githinji; and like in Githinji's case, Joan's estate made up two parcels of land known as Tigithi/Matanya/Block 5/1031 and Title No. Ruguru/Kiamariga/516 devolved upon the respondent absolutely.

The applicants' case against the respondent is that the two grants were obtained fraudulently by means of untrue allegation of a fact essential in point of law to justify the grant and in this regard, they invoked section 76 of the Law of Succession Act, cap. 160.

In the affidavits they have sworn in support of the summons, the applicants stated that the deceased couple did not have any child and neither did they have any sibling who was known to be alive at the time of their demise. Their closest kin was the applicants' mother who was Githinji's sister; incidentally she was also deceased. The applicants are therefore the deceased couple's nephews.

The respondent, on the other hand, is not related to any of the deceased in any way. Even then, she described herself as the deceased's daughter, a fact she very well knew is untrue. Again, although she was aware of the existence of the applicants, she neither disclosed this fact in the petitions for grant of letters of administration nor informed the applicants whom she knew all along were the deceased's closest relatives.

In response to these questions of fact, the respondent filed a replying affidavit from which, as far as I can gather, she admitted that Githinji was the applicants' maternal uncle. She also contested that the allegation that the applicants are the deceased's closest kin; according to her she is a closer kin because, in her own words, she is the deceased couple's daughter.

But then she has deposed further that in 1964 she married one Baaru Ngatia who later introduced her to Githinji and Joan as his adopted parents and who, for that reason, paid her dowry. After this, Githinji and Joan treated her as their daughter. In return, she and her late husband managed the deceased's affairs including their property; they took care of them and paid their hospital bills when they were sick and even the respondent took Joan in and lived with her for some time immediately before she died. They both buried the deceased.

She deposed further that the allegations against her by the applicants are not new; according to her, they had made the same complaints to the police as a result of which she was charged with three criminal offences related to the deceased's estate in Karatina Resident Magistrates' Court Criminal Case No. 249 of 2003. These allegations were dismissed and she was acquitted of all the charges. She has exhibited the proceedings and the judgment in the criminal trial to her affidavit.

At the hearing of the summonses, parties and their witnesses largely reiterated the depositions in their respective affidavits; the salient facts which stand out in these rival depositions and testimonies and which, in my humble view, are central to the determination of the summonses are; first, the deceased couple died intestate; second, that they did not have a child of their own; third, they neither had parents nor any sibling at the time of their demise; fourth, the respondent was not relative of the couple; and fifth, the applicants were the nephews of the couple.

Nowhere are these facts more apparent than in the respondent's own sworn statement of defence in the Karatina Resident Magistrates Court Criminal Case No. 249 of 2003 the proceedings and the judgment of which the respondent has sought to rely upon.

The basis of that case was the petitions and grants which the respondent obtained in respect of the deceased couple's estates and the subsequent devolution of their estates upon her. In order to appreciate the respondents sworn evidence in that case, it is necessary to state here the charges against the respondent and the particulars upon which those charges were based.

In the first count the respondent was charged with false swearing contrary to section 114 of the Penal Code, cap. 63 Laws of Kenya. The particulars in this count were that on the 26th day of May 1999 at Karatina Township before Maina Karingithi, a person authorised to administer oaths, swore falsely that she was a daughter to the late Joan Wanjugu Githinji and Maina Githinji in succession causes No. 42 and 43 of 1999.

In the third and fourth counts, she was charged with the offences of obtaining land registration by false pretences contrary to section 320 of the Penal Code and here the particulars were that on the 14th day of February 2002 and 22nd day of February 2001 at Laikipia land registry, the respondent willfully obtained land parcel No. Matanya/Tigithi/Block 5/1031, Magutu/Ragati/2, Ruguru/Kiamariga/516 and Konyu Baricho/183 by falsely pretending that she was the daughter to Githinji Maina and Joan Wanjugu Maina.

In response to these accusations, the respondent gave a sworn testimony that largely puts to rest issues that are in dispute in this cause; the excerpts of her testimony, as far as they are relevant to the issues at hand were captured as follows:

“It is not true that I deponed(sic) a false affidavit. The deceased were members of my clan. I got married in 1964 to Paul Baaru Ngatia. After one year he took me to the two deceased and told me that they were his adopted parents. He told me it is Githinji Maina who was paying my dowry. Githinji was there when I was told it(sic)...

“After they died I started the process of obtaining letters of administration. I obtained a letter from the chief. I told the chief that I was their daughter-in-law. The chief gave me the letter. Kamau was with me when I went to the chief. The chief said he will investigate. He later issued me with the letter. I swore an affidavit before Karingithi advocate. The succession papers were prepared at his office. I was with Kamau Joshua and Muriuki Maburo. The advocate told me to get two sureties. I took them. I told the advocate my relationship with the deceased.

“...when I appeared in court the court inquired how I was related to the deceased. I said I was their daughter-in-law.

“...I did not tell the chief that I was the biological daughter of the deceased. I told him that I was their daughter by being married by their livestock. What the letter of the chief says is not what I told him. I did not say I was their biological daughter.

“...I know Mwangi Githae. He is related to Githinji Maina. Githinji was an uncle to Mwangi Githae. I did not tell him when I was bringing the matter to court. They could have known through Gichohi because Gichohi knew...

“...the mother of Mwangi and Githinji were from the same mother. Mwangi's mother was married...”

And her witness, Charles Wachira Ngati, had this to say in respect of the applicants:

“the sister to Githinji has sons. I know Mwangi Githae. Githinji Maina was his uncle. Mwangi was living at Kiamabara. We did not inform Mwangi and his brother about the succession cause.”

The respondent's and her witness' testimony are all but consistent with the applicants' case that the respondent not only knew of the existence of the applicants but also that she knew that they were the deceased's relatives. She has admitted in no uncertain terms that she not only effectively suppressed these material facts from the court but also that she deliberately chose not to inform the applicants of her petition for grant of letters of administration.

What's more, she has admitted that she was not a biological child of the deceased couple and although she claims that the deceased were her adopted parents there is no evidence of such adoption; what I understood her to say is that one year after she was married, her husband introduced her to the deceased as his parents albeit adopted. Certainly, she couldn't have been adopted in these circumstances and neither was her husband who was evidently leaving elsewhere apparently on his own land where the respondent has settled to date.

As much as she has insisted that she was clear with the chief that she was a daughter-in-law to the deceased, she eventually swore an affidavit in which she categorically stated that she was the deceased's daughter; she never qualified this description to state that she was either an adopted daughter or a daughter-in-law. In these circumstances, I am convinced that the respondent deliberately misled the court to believe that she was the deceased's only child and the only survivor to their estates. She may have escaped with an acquittal in the criminal case, no doubt, because the standard of proof in such cases is higher but she cannot get away with such deliberate and obvious misdescriptions in matters succession.

For avoidance of doubt, Section 76 of the Law of succession Act is clear that a grant obtained in such circumstances should either be annulled or revoked; it states as follows:

76. 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.

Parts (b) and (c) would be more pertinent to the present circumstances; from the available evidence it is clear that either the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the petition or 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; whichever the case, it cannot stand the test of time.

For the reasons I have given, the grants made to the respondent on 12 April 2000 and subsequently confirmed on 31 January 2001 in respect of the estates of Joan Wanjugu Githinji alias Joan Muchugu and Githinji Maina in Karatina Resident Magistrates' Succession Causes No. 42 of 1999 and No. 43 of 1999 respectively are hereby revoked and or annulled.

The question that logically follows is this: Who would be entitled to inherit the deceased couple's estates? To find the answer to this question one needs look no further than section 39 of the Law of Succession Act which states as follows:

39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund

According to section 39(1)(c) the applicants would be the most eligible candidates to inherit the deceased's estates; it is common ground that the two are the sons of Githinji's sister but who, incidentally, is deceased as well.

The court was informed that the second applicant died while this cause was pending; in the absence of any application or order for his substitution, I hereby appoint Richard Maina Githae as the sole administrator of the estates of Joan Wanjugu Githinji alias Joan Muchugu and Githinji Maina.

Consequent upon the nullification or annulment of the grants made to the respondent, I hereby order the land registrars in whose registries or jurisdictions the following parcels are registered to cancel the transfers and titles issued to the respondent and rectify the register in such a way that the same shall revert to the respective names of the deceased:

- 1. Title No. Konyu/ Baricho/183 (measuring approximately 0.53 acres)**
- 2. Title No. Magutu/Ragati/2 (measuring approximately 6.68 acres)**
- 3. Tigithi/Matanya/Block 5/1031 (measuring approximately 1.306 hectares)**
- 4. Title No. Ruguru/Kiamariga/516 (measuring approximately 0.7acres)**

For completeness of record and owing to the fact that this matter has been for two decades, and more importantly, by the powers with which this honourable court is clothed under section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules, I order that deceased's estates shall devolve upon Richard Maina Githae; accordingly, these parcels of land shall be transferred and registered in his name absolutely.

Parties will bear their respective costs. It is so ordered.

Dated, signed and delivered in open court this 22nd day of January, 2020

Ngaah Jairus

JUDGE