



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 73 OF 2002

(IN THE MATTER OF THE ESTATE OF NGUNJIRI GATATU (DECEASED))

CECILIA WAMBUI KANG'ETHE.....APPLICANT

-VERSUS-

PETERSON NDIRITU NGUNJIRI.....RESPONDENT

JUDGMENT

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

The deceased, Ngunjiri Gatatu, died intestate on 31 December 1977; he was domiciled in the Republic of Kenya and his last known place of residence was Tetu location in Nyeri County.

According to the petition for grant of letters of administration filed by the petitioner on 21 March 2002, the deceased was survived by two widows, Ruth Muthoni Ngunjiri and Jedidah Wangechi Ngunjiri each of whom had several children with the deceased. Ruth died while this cause was pending but it appears Jedidah died much earlier.

The deceased's intestate estate comprised parcels of land known as Title Nos Tetu/Karaihu/255 measuring approximately 11 acres and Tetu/Karaihu/256 measuring approximately 5.8 acres. He is also said to have had another parcel of land described as plot No. 36 but which was unregistered at the time of his death.

The grant of letters of administration was eventually made to the respondent on 2 September 2002. By a summons for confirmation of grant dated 15 January 2004 he sought to have the grant confirmed and the estate shared equally between the deceased's two houses.

On 10 August 2005 a 'replying affidavit' purportedly sworn by the applicant was filed basically opposing the distribution of the estate as proposed by the respondent. The applicant was later to disown the said affidavit.

The record shows that the grant was confirmed on 29 June 2007. A subsequent application to have the executive officer execute the transmission documents was allowed by this honourable court on 14 November 2007 and, with that, the deceased's estate was eventually transmitted as proposed by the respondent.

Title No. Tetu/Karaihu/256 was transferred and registered in the name of the respondent absolutely. The applicant seems to have been aggrieved by transmission of this particular asset in the deceased's estate and so, by a summons dated 17 December 2014, she invoked section 76 of the Act and sought to have, inter alia, the 'the certificate of confirmation of grant dated 29 June 2007' revoked or annulled forthwith. She also sought to have the Nyeri County land Registrar cancel the title deed in respect of Title No. Tetu/Karaihu/256 apparently issued to the respondent on 24 July 2014.

The sole ground upon which she based her summons was that the grant was obtained fraudulently by the making of a false statement or by concealment from the court something material to the case.

In her affidavit in support of the summons, the applicant swore that she is the deceased's daughter-in-law having been married to Anderson Githinjiri Ngunjiri, one of the deceased's sons in the first house but who died on 28 May 2003, during the pendency of this cause. The

respondent, so she has deposed, did not disclose in his petition the fact that the applicant was not only married to one of the deceased's sons and that the two of them had been blessed with one child whom she identified as RWN but also that, for that reason, she was entitled to inherit a share of the deceased's estate.

According to the applicant, both her deceased husband and the respondent were brothers from the first house. She had, all along, lived with her late husband on Title No. Tetu/Karaihu/256 and it is on this parcel of land she is settled to date.

The applicant is aggrieved that while the respondent was aware that his brother, the applicant's husband, had an interest in the deceased's estate, he deliberately excluded the applicant and her daughter from the list of beneficiaries of the deceased's estate. Instead, so she had deposed, he has transferred the land Title No. Tetu/Karaihu/256 to himself and she fears that he may evict her at any time. For this reason, she has urged this honourable court to revoke or nullify the grant.

The respondent opposed the application and filed a replying affidavit in which he has sworn, inter alia, that the applicant was in court during the confirmation proceedings and, like other members of the deceased's family, she never protested against the confirmation of grant; in the absence of any protest, the grant was confirmed. In any event, so he has sworn, the applicant is not the wife of Anderson Githinji; rather, he has named one Mary Waitiri as the only wife of Githinji.

The respondent also disputed the applicant's assertion that she has been in occupation of the suit land all along.

At the hearing of the summons, the applicant reiterated that she was the deceased's daughter-in-law having married his son in 1992 at Mai Mahiu in Narok county where they used to live before they moved to Nyeri and settled on the suit land in 1996.

It was her evidence that in 2014 she discovered that the land had been transferred to the respondent's name and since then the latter has been harassing her with the ultimate objective of pushing her out. It was her case that she is entitled to a share of the deceased's estate which is due to her husband.

She denied knowing Mary Waitiri Githinji whom the respondent introduced as the one and only wife of Anderson Githinji. She couldn't, however, explain how she could not know Waitiri yet she had exhibited on her own affidavit a letter she had obtained from the chief, Tetu location, in which Waitiri had been introduced as one of Githinji's two wives.

Peter Gatitu Ngunjiri, one of the deceased's children in the second house, agreed with the applicant that indeed she was Githinji's second wife and that she has lived on the suit land since 1996. The respondent on the other hand has settled on Title No. Tetu/Karaihu/255.

Fredrick Mathu, one of the other witnesses for the applicant, testified that he knew the applicant in 1989 and he was aware that she married Githinji in 1992 because they all lived together in Narok county. As a matter of fact, he brought Githinji with his wife back to Nyeri in 2003 when he became ill.

On his part, the respondent did not dispute that Anderson Githinji was his brother; he was indeed his only brother. The other sibling was Ann Wangui Ngunjiri but who was deceased also.

He testified that he had shared out the deceased's estate equally between his father's two houses. As far as his mother's share of the estate is concerned, he divided it between himself and Githinji's wife, Mary Waitiri.

He admitted that he knew the applicant but only as Githinji's friend and not his wife. He also acknowledged that the applicant had lived with Githinji since his time in Narok and that they moved together to Nyeri where they settled on Title No. Tetu/Karaihu/256. The two, according to his evidence, had one child between them. He agreed with the applicant that she has been living on this parcel of land to date.

Mary Waitiri Githinji testified that he was the wife of Anderson Githinji and that she married him in 1984. Together they had four children all of whom are alive. It was her evidence that she was the only wife of Githinji.

Turning to the applicable law, Section 76 gives this court power to revoke or annul a grant, whether confirmed or not, as long as it can prove that such a grant is vitiated on any of the grounds specified in that provision; 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.

Since the applicant's application is based on ground 76(b), it was always incumbent upon the applicant to demonstrate that in obtaining the grant, the respondent was fraudulent either because he deliberately misled the court by making of a false statement or that he concealed from the court some fact material to the case.

If I got the applicant's evidence correctly, the material fact that is alleged to have been suppressed from the court is the fact that the applicant was the deceased's daughter-in-law and that together with the deceased's son, they had been blessed with a daughter. One other thing that is alleged to have been concealed from the court but which the applicant considers to be material to the case is the fact that the applicant had settled on Title No. Tetu/Karaihu/256 together with her husband before he died.

When I look at the affidavit sworn by the respondent on 23 January 2002, in support of the petition, I note that the respondent listed the deceased's wives and all his children both from the first house and the second house as having survived him. Anderson Githinji Ngunjiri is listed as one of the three children from the first house.

According to section 51(2) (g) of the Law of Succession Act, all that the petitioner needed to have listed as persons who survived the deceased are his surviving spouses, children, parents, brothers and sisters; in the event that any of his children is deceased, the name and address of their child or children (or the deceased's grandchildren). This is reiterated in rule 7(1)(e) of the Probate and Administration Rules which is to the effect that an application for grant of representation shall include such information as:

(e) in cases of total or partial intestacy –

(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39 (1) of the Act.

In my humble view, in listing the deceased's survivors as he did, the respondent complied with the relevant substantive law and the rules made thereunder.

It must be noted that the petition was filed in the lifetime of Anderson Githinji Ngunjiri; he was, as noted, listed as one of the deceased's children and, having been so named, the respondent was not under any obligation to name his spouse as well or any spouse of any of the other deceased's children for that matter. They would, of course, be named as the deceased's other dependants if at all they dependent on him immediately prior to his death; however, the applicant has not suggested, and neither is it her case, that she falls into this category of people.

It follows that the grant made to the respondent cannot be impeached on the ground that the it was obtained fraudulently because the applicant was omitted from the list of the beneficiaries.

The fact that the respondent did not also disclose that the applicant was the deceased's wife and that they occupied part of the deceased's estate was also not material to the case at the time of the petition. It may be true that indeed the applicant and Anderson Githinji Ngunjiri lived on Title No. Tetu/Karaihu/256 but under section 51 of the Act and rule 7 of the Probate and Administration Rules, such information is not necessary. If anything, the application for grant of letters is in a prescribed form and nowhere in the application is a provision made for this sort of detail.

Much of the applicant's case was not so much about the invalidity of the grant of letters of administration of the deceased's estate; it had much to do with her claim on part of the deceased's estate, not in her own right but as a wife of one of the deceased's sons. To quote her, this is what the applicant said in her evidence:

I want to inherit the share due to my husband. The title number 256 should be in my name.

No doubt this is a fundamental question but which, in my humble view, was canvassed in the wrong forum. I would suppose that the appropriate forum in which this question ought to have been determined was the confirmation proceedings; it is in those proceedings that the applicant ought to have invoked rule 40(6) of the Probate and Administration Rules and protested against the scheme proposed by the respondent for the distribution of the deceased's estate; that rule states:

(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.

It is in those proceedings that the applicant ought to have pursued her husband's right to the deceased's estate. But even then, the applicant ought to have first obtained a grant of representation authorising her to represent her husband's estate considering that she claims that part of the estate that ought to have been given to Anderson Githinji Ndirangu whom she alleges to have been her husband.

When an applicant holds himself or herself out as representing the interests of a deceased person or his estate, then he or she is bound to demonstrate that they have the requisite authority to do so, particularly in such a case where someone else has emerged and testified as being

the only wife of the deceased.

With or without such a contestation, it has been held **Troustik Union International Ingrid Ursula Heinz versus Jane Mbeyu & Another in Civil Appeal No. 145 of 1990 reported as (1993) eKLR** that under section 82(a) of the Law of Succession Act, the power to agitate, by suit, any cause of action vested in the deceased at the time of his death vests in his personal representative who in turn is defined in section 3 of the Act to mean executor or administrator of a deceased person. And 'administrator' means the person to whom letters of grant of administration has been made under the Act.

In the present case no letters of grant have been made to the applicant and therefore even if she had lodged her protest on the basis that she represented the interests of Anderson Githinji Ngunjiri, she would not go that far.

If I was to restrict myself to the application before me, I would simply conclude that the grant of letters of administration in respect of the deceased's estate is not vitiated on any of the grounds under section 76 of the Act and therefore the applicant's summons for revocation of grant stands no chance.

But there is some hope for the applicant; if she could obtain the requisite authority to represent the estate of Anderson Githinji Ngunjiri, there would be no reason why she cannot get share of the estate due to the deceased's first house. I suppose it is in the proceedings for grant of letters of administration of Ngunjiri's estate that the question of whether Ngunjiri was polygamous or not will conclusively be determined.

All I can say for now is that the applicant's summons dated 17 December 2014 has no merits and it is hereby dismissed. Parties will bear their respective costs. It is so ordered.

Dated, signed and delivered this 9th day of April 2020

Ngaah Jairus

JUDGE