



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 51 OF 2013

(formerly Embu Succession Cause No. 294 OF 2009)

IN THE MATTER OF THE ESTATE OF GAKUYA MARIRA (DECEASED)

JANE WANJA KARATU & ANOTHER.....APPLICANTS

VERSUS

FAITH NYAWIRA NGANGA & 3 OTHERS.....RESPONDENTS

AND

JAMES KINYUA KARANI & ANOTHER.....INTENDED INTERESTED PARTY

JUDGMENT

1. This matter relates to the estate of Gakuya Marira (deceased), who died Inte-estate in 1959. A grant of letters of administration inte-estate to his estate was issued to Faith Nyawira Ng'ang'a on 3rd of April, 2009. It was later confirmed on 14th April, 2009. The estate of the deceased which comprised in Land /Parcel No. Mutira/Kathare/31 was distributed equally to:

Peterson Muthike Karatu

David Mwangi Karatu

Henry Maina Karatu.

The cause was before the Principal Magistrate's court Kerugoya.

2. Thereafter, summons for revocation and annulment of grant was filed by Jane Wanjira on 3rd June, 2009. She prays that the letters of administration confirmed on 3rd of April, 2009 to Faith Nyawira Ng'anga vide Kerugoya Senior Resident Magistrate court succession cause No. 275 of 2007 be revoked and annulled on the following grounds;

a) That the grants of letters of administration inte-estate of the estate of the above named and the certificate of confirmation of grant issued thereof were obtained fraudulently by making a false statement and concealment from court of facts material to the case.

b) That the said grant and certificate of confirmation were obtained by means of untrue allegations of facts.

The application is based on the grounds that:

a) The applicants' are real sisters to the respondents/ petitioners herein.

b) That the respondents did not include us in Kerugoya proceedings, neither include us in the distribution of the deceased estate.

c) That as the children and beneficiaries of their father's estate the applicants were deprived of their rightful inheritance.

3. The application is also supported by the affidavit of Jane **Wanja Karatu** wherein she deposes that herself and the 2nd applicant are granddaughters of the deceased. That although they were all beneficiaries of the deceased the respondent went secretly and filed this succession proceedings that is Kerugoya succession cause no. 275 of 2007 Estate of **Gakuya Marira**. That in distributing the estate of the deceased the respondent failed to include or failed to disclose to the court of their existence and failed to distribute a share of the estate to them.
4. She further contends that they did not participate in the Succession proceedings and their names were not included.
5. That the grant of letters of administration was obtained fraudulently and by concealment of matters material to the suit as the law requires that all the beneficiaries of the deceased have to be informed of the proceedings that the respondent failed to comply with the Law of Succession Act as she showed much discrimination based on gender.
6. That in the circumstances the grant issued to the respondent ought to be revoked as the respondent did not distribute the estate of the deceased in equal shares. That the court to issue another certificate of grant sharing the estate of the deceased to all the beneficiaries.
7. The respondents, opposed the application and filed a replying affidavit sworn on 26th February, 2010 by Faith Nyawira Nganga. She deposes that she is the granddaughter of the deceased whose estate the proceedings herein relate. She contends that the grant sought to be revoked was neither obtained fraudulently by making of a false statement and concealment from the court of something material to the cause nor was the grant obtained by means of untrue allegations of fact essential in a point of law to justify the grant as alleged by the applicant.
8. It is her contention that it is in fact the applicant who has fraudulently made false statements has concealed material facts and made untrue allegations of facts in their present application.
9. That the Succession cause was filed openly and it was gazetted for anybody who has objection to file the same.
10. That the said Succession cause was filed by one Stanley Karatu Gakuya who succeeded the estate of his late father Gakuya Marira and therefore the applicants', being grand children to the deceased were not entitled to a share of that estate.
11. That the applicants' are married and live with their husbands' and do not reside on Land parcel number **Mutira/ Kathare/31**.
12. That the applicants are aware that the late Stanley *Karatu Gakuya* had indicated that the said land should be shared between his sons and that even herself did not get any share from the said land. Her prayer is that the application for revocation of grant be dismissed with costs.
13. The 2nd, 3rd and 4th Respondents have filed a joint sworn affidavit, contending that they are opposed the application for revocation of grant on the ground that our grandfather's estate was distributed to the rightful beneficiaries and contrary to the allegation by the applicants, the grant was not obtained fraudulently by making of false statements and concealment to the court of something material to the case nor was it obtained by means of untrue allegations of facts essential on a point of law to justify the grant as alleged by the applicant. They depose that they adopt the sworn affidavit sworn by **Faith Nyawira Nganga**.
14. Before this application could be heard and determined, *James Kinyua Karani and Francis Chege Macharia* filed a summon under **Rule 73 of the Probate and Administration rules** seeking an order that they be joined as Interested parties claiming as purchasers.
15. The 1st interested party James Kinyua Karani contends that he bought 1 ¼ acres from the 2nd Respondent's land parcel number **Mutira/ Kathare/ 1105**. While the 2nd interested party bought **0.5 Ha** out of the same land parcel. That they bought the land after confirmation of grant and it is fair and just that they be enjoined in the cause to protect their interest.
16. That interested parties were are enjoined in the suit and the 5th respondent that is (1st interested party) was ordered to file a replying affidavit. He filed a replying affidavit sworn on 26th of June, 2018. He deposes that on 14th of March, 2014 he entered into an agreement with *Peterson Muthike Karatu* whereby he sold to him half an acre of his land parcel number Mutira / Kathare/ 1105 for Kshs; 650,000/=. He paid Kshs; 550,000/=:, living a balance of Kshs; 100,000/=. Thereafter, on 18th of August, 2014 they entered a Supplementary agreement whereby he agreed to add him ¾ of an acre of the land making a total of 1¼ acres out of land parcel number Mutira/ Kathare /1105 for the consideration of Kshs; 1,625,000/=:, that he paid a total of Kshs: 1.479,000/= living a balance of Kshs:146,000/=: He contends that at the time of purchase he was registered absolute proprietor of the land and he was therefore a bonafide purchaser for value without notice and he prays that the application be dismissed.
17. On 17th May, 2016 this court gave directions that the summons for revocation of grant dated 3rd of June, 2009 shall proceed by way of '**Viva Voce**' evidence.
18. The 1st and 3rd respondents are represented by Mr. Nduku Njuki advocates, the 2nd and 4th respondents are represented by Mr. Ndana advocate. However on 26th of April, 2017 Mr. Ndana applied to cease acting for the 2nd and 4th respondents. The 2nd and 4th respondents did not oppose that application, and agreed to proceed in person.
19. When the matter came up for hearing the applicant **Jane Wanja Karatu** (Pw1) gave evidence that the deceased was her grandfather and she could not remember when he died because she never met him. She told the court that Mr. Stanley Karatu

Gakuya is her father. She found her father living on the land in dispute they were six (6) siblings herself and the three (3) respondents and the two (2) applicants.

20. Their father died, and the Succession was filed by **Faith Nyawira Nganga**. She did not know when the Succession was filed and came to know after everything was over. They had been using the land but when their parents died they were told to stop using the land and she told the court that she filed this application so that the court can order that they be given land.

21. She testified that the deceased is their grandfather and like the other children who are the respondents' in this case she was entitled to a share of the estate.

22. In cross-examination she told the court that Faith did not inform her when she filed the Succession and she did not know what was going on.

23. Pw2 Tabitha Wamutira Kinyua testified that the deceased Gakuya Marira was her grandfather. She adopted the evidence of PW1 that both Pw1 and Pw2 admitted that they are married. The applicants did not call any other witness they closed their case.

24. The respondents Faith Nyawira Ng'ang'a (Dw1) adduced evidence that Gakuya Marira is her grandfather. She confirmed that he had six children, five daughters and one son by name Stanley Karatu Gakuya. Her grandfather owned land parcel number **Mutira/Kathare/31**.

25. My father filed Succession in 2007 it was not concluded because he passed away in 2008. She testified that her father had six children, three daughters, and three sons. He wanted to distribute the land to his sons and he sub-divided it into four portions. She further told the court that there was a word that married daughters should not inherit. She adduced evidence that after their father died she called her aunties and her brothers and sisters and informed them that she was the one who was supporting their deceased father with money when filing Succession and that she would continue with the work. She substituted her father in the Succession cause and it was concluded. The three sons got equal shares of the land which was left by her father. That the three brothers are;

- Peterson Muthike Karatu

- David Mwangi

- Henry Maina

That each of them got an equal share and they obtained their respective title deeds.

26. Dw1 testified that Jane Wanja and Tabitha Wamutira who are the applicants' were present during all the meetings which were held by the family. That they were the ones who used to accompany their deceased father to court when the Succession proceedings were going on.

27. That the applicants' were aware of the Succession proceedings. That she did not get a share of the estate herself and that the two applicants should be satisfied with the distribution. She urged the court to dismiss the application with costs as it can ruin the family.

28. In cross - examination Dw1 told the court that there was a curse that married daughters should not inherit land and their father complied with that.

29. She maintained that after their father died the family sat down and agreed that she substitutes him as the administrator.

30. Dw2 Peterson Muthike Karatu adopted the evidence of Dw1 and also urged the Court to rely on his witness statement. During cross-examination Dw2 told the court that they attended meetings which was discussing about the estate of their grandfather. He further testified that he was in court when the grant was confirmed.

31. He further told the court that the applicants' were present during the family meetings which were held after their father's death. He further told the court that their deceased father had stated how the land would be distributed.

32. Dw3 David Mwangi Karatu on his part associated himself with the evidence of FAITH NYAWIRA and adopted his witness statement as his evidence. In cross - examination he told the court that FAITH NYAWIRA distributed the estate in accordance with what their deceased father had directed.

33. The respondents called Priscilla Wanjira Gakuya alias Priscilla Wanjira Mutugi (Dw4) she testified that she is a daughter of Gakuya Marira. They were six siblings five daughters and one son who is Karatu Gakuya. She told the court that the daughters of Gakuya Marira did not get land because their father had said about the land and married daughters.

34. That after Karatu Gakuya died his children called her and they had a family meeting. She testified that the daughters said that they did not want to inherit land in accordance with the wishes of their grandfather that married daughters should not get land.

35. She further told the court that the family agreed that the three sons of Karatu should inherit the land.

36. As for James Nganga Reuben Gakunga (DW5) his testimony was that DW1 Faith Nyawira is his wife. He testified that he was aware that her father had started Succession but died before it was concluded. There was a meeting and it was agreed that Faith continues with the Succession and that her father had divided the land into four portions and had said that the portion in his name should go to his three sons and that they were to share the land equally. That he testified that there was a meeting which was attended by all the family members who were the family members and all the children of the deceased.

37. The Interested party James Kinyua Karani (Dw6) testified that he bought land from Peter Muthike Karatu measuring 1 and ¼ acres and he paid Kshs; 1, 625,000/= living a balance of Kshs; 146,000/= he moved into the land and constructed a permanent house and has been using the land. He further testified that before buying the land he conducted a search in the lands office and found that the land had no caution. He produced the Sale Agreement the green card for *Mutira/ Kathare/ 31* and certificate of official search. He urged the court to protect his interest as he was not aware that the family had a dispute over the land.

38. He further testified that his neighbor Francis Chege Macharia was also sold land by Peterson Muthike Karatu, and he bought the land for Kshs; 800,000/= and he paid Kshs; 210,000/= living a balance. They entered a supplementary agreement to purchase **0.1 ha** and he added Kshs; 200,000/=. The total acreage of the land he bought was 1 and ¼ acres. He produced the Sale agreement which is exhibit number 7.

39. The parties agreed to put in submissions. For the applicant submissions were filed by Igati Mwai & Company Advocates. He submits that the estate should be shared equally amongst the applicants, 2nd 3rd and 4th respondents since the 1st respondent has no interest in the estate.

40. The 1st 2nd and 3rd respondents did not file any submissions. For the 1st and 2nd interested parties submissions were filed by Wangechi Munene & Company Advocates. She submits that the interested parties bought land from one of the beneficiaries after the letters for administration had been issued and the vendor had been listed as one of the heirs of the deceased estate and was also the proprietor of land parcel Mutira/kathare/1105. She submits that the 1st and 2nd interested parties acquired rights over the piece of land and the transaction created a constructive trust in favour of the purchaser when he paid the consideration. She further submits that the Interested parties were bonafide purchasers for value without notice and she referred the court to the case of: *Vatende -versus- Hariday & Company limited (2008) E.A 173* where the Court of Appeal in Uganda held that for the purpose of this appeal it suffices to describe a bonafide purchaser as a person who honestly intends to purchase the property offered for sale and not intend to acquire wrongly. For a purchaser to successfully rely on the bonafide doctrine he must proof that;

- (a) He holds a certificate of title*
- (b) He purchased the property in good faith*
- (c) He had no knowledge of the fraud.*
- (d) He purchased for value consideration.*
- (e) The vendors had a parent valid title*
- (f) He purchased without notice of any fraud.*
- (g) He was not party to any fraud.*

He prays that the application for revocation of grant be dismissed.

41. For the 5th respondent Submissions were filed by Ngige Gichoya & Company Advocates. He submits that the application is bad in law as the application has not adhered to the provisions of Rule 44 of the Probate and Administration rules. He submits that the want of form is fatal to this application and the same should be dismissed. He relies on *Section 76 of The laws of Succession Act* and submits that the applicants have not fulfilled the requirements under the Section. He further submits that the 5th respondent bought 0.6 Ha out of the suit property for value and in good faith from the 4th respondent and is protected under *Section 93 of The Law of Succession Act* having bought a share of the suit property from the 4th respondent for value and in good faith. He has referred the court to various authorities and prays the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

42. The main issue for determination is revocation of grant. *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 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.”

43. A party seeking revocation of grant has to prove that the grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the case that the grant was obtained by means of untrue allegation of a fact essential on a point of law to justify the grant or that the grant has become useless and inoperative through subsequent circumstances.

44. The deceased in this case died in the year 1959. Under section 2 (1) (2) of the Law of Succession Act it is provided that

“except as otherwise expressly provided in this Act or any other written law the provisions of this act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of deceased person dying after the commencement of this act and to the administration of estates of those persons.

The estate 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.”

45. The law applicable to the estate of the deceased person in this case is the written laws and customs at the date of his death. The administration of such estates shall commence or proceed so far as possible in accordance with this Act.

46. This means that once the law of Succession Act was enacted then the procedure of filing of Succession Cause would be as per the Act. The distribution of the estate on the other hand would be subject to the written law and customs applying at the date of death. The deceased having died in 1959 the law applicable then was the Kikuyu Customary Laws. So according to Kikuyu customary law, the general principle is that Kikuyu law of inheritance is patrilineal, that is to say equal distribution of a man's property amongst his sons.

47. Where the deceased was polygamous his property would be shared amongst the houses of each of the widows. The widows would have life interest the daughters are normally excluded if they are married and unmarried daughters are given a part of the share of the estate. In the Court of Appeal in the case of Mary Wanja Gichuru -versus- Esther Watu Gachuhe Civil Appeal No. 76 of 1998 held that;

“it is a matter of notoriety amongst the Kikuyus that an unmarried daughter who becomes a mother must inform her father of the name of the father of the child so that her father would take the necessary steps to preserve the rights of his daughter and her son. It is unthinkable that an unmarried daughter remaining in her father's house would give birth to five children. This only goes to show that Esther must have been married and it is settled Law that under the Kikuyu custom land is inherited by sons. It is patrilineal society.”

The Court of Appeal cited with approval the opinion expressed by the late President Jomo Kenyatta in his book Facing Mount Kenya at page 29 where it stated:

“after sometime the family began to increase. Let us imagine that each wife had three sons and perhaps some daughters. But as female children do not take part in the ownership of land we will leave them out, because, having no system of spinsterhood in the Kikuyu society women do not inherit land on their father's side they play their part in the family or clan in which they marry.”

48. In this case the clear intentions of the deceased as testified by the 1st respondent and her witness DW4 are that married daughters' would not inherit the estate and it would be inherited by the sons. Although the Kikuyu customary law has gone through some changes due to changes in the Society embracing principles of nondiscrimination. The consideration is whether customs should be upheld. The courts have upheld this custom that married daughters are not supposed to inherit land under the Kikuyu Customary Law. In the case of: Wambugu Gatimu -versus- Stephen Nyaga Kimani (1992) 2KAR 292, the only question is whether the custom that married daughters do not inherit land is in conformity with Section 3 of the Adjudicature Act. No evidence was read by the disputants in the Intestate Succession that it is repugnant to morality and justice. Kikuyu customs did not contemplate married daughters as heirs to the estate of their deceased father and it would therefore be immaterial that they were not informed when the Succession was filed.

49. **The Judicature Act Chapter 8 Laws of Kenya** has given guidance on the application of the **Customary laws and Customs Section 3 (2)** provides:

“The High Court, The Court of appeal and all sub-ordinate 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 to any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

50. There was no allegation that the Customary Law on inheritance as it relates to married daughters is repugnant to justice and morality. The courts upheld the Customary Law and in this case the applicants were married granddaughters of the deceased who died in 1959. The distribution is not under the Law of Succession Act. The applicants are therefore not supposed to inherit the estate of the deceased.

51. What the court has to determine is the distribution of estates of persons dying before the commencement of the Act. The applicants' though denying that they were not aware of the Succession proceedings the evidence adduced by the respondents confirms that the applicants were aware of the proceedings and did not raise an objection nor did they file a protest. There is evidence from the 1st respondent who is the administrator of the estate and Dw4 that after the father of the applicants died they held meetings and the applicants were present in this meeting. There is strong evidence to show that the applicants attended those meetings and agreed that the first respondent would substitute their deceased father. It was agreed that married daughters would not inherit land in accordance with the wishes of the deceased. In deed from the grant none of the granddaughters of the deceased including the administrator were given land. Priscilla (Dw4) who was the sister of the father to the applicants and respondents and a daughter of the deceased, in line with the wishes of his father did not get land as well as her sisters. It has been held that the fact that under the customs that married daughters were not supposed to inherit land is not repugnant to justice and morality.

52. On the other hand under the **Law of Succession Act** a claim for dependency has a limited time frame. It is provided under **Section 30** that;

“no application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71.”

53. The applicants who claim dependency ought to have brought the claim before the grant was confirmed. This provision puts a limitation period within which a claim for dependency should be brought.

On the claim by the Interested parties who claim to have bought land from one of the beneficiaries it must be considered under Section 93 of the Act. The Interested parties claim to have bought land from the 4th respondent after the grant was confirmed. Indeed at the time they bought the land the estate had been distributed and one the beneficiaries Peterson Muthike Karatu sold to the Interested parties a portion of the estate which was distributed to him that is **Mutira/ Kathara /1105**.

Section 93 (1) of the Laws of Succession Act provides that

“ A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

In the case of; **STEPHEN MWANGI -VERSUS- JOYCE WANJIRU WATHUA & Another (Mis. Application 1999)** It was stated that

“ My interpretation of the Section (Section 93 (1) of The Act, is that a transfer of any interest in immovable or movable property made to the purchaser who has obtained letters of administration cannot be impugned by any subsequent revocation of the grant. That is to say any subsequent revocation of the grant shall not affect the purchaser of the property if the sale of the property between the administrator of the estate and the purchaser was valid.”

The Section provides that a bonafide purchaser for value after the grant has been confirmed is protected the estate was distributed in 2009, the grant was registered and the land was distributed and title deed was closed on partition. The new numbers were issued. The interested party entered an agreement to buy land parcel number Mutira/ Kathare/1105. The interested parties have purchasers interest. The position in this matter is that the estate has been transmitted to the beneficiaries and subsequently transferred to third parties whose rights are protected under **Section 93 (1) of The Act**.

Revocation of grant would not serve any useful purpose as the Title has changed hands. The applicants' were fully aware of the proceedings and never objected to the distribution and the application is an afterthought.

54. The estate was distributed in 2009, the grant was registered and the land was distributed to the beneficiaries and the title was closed on partition. The new numbers were issued. The interested party entered agreement to buy land parcel no. **Mutira/ Kathare/1105**. The interested parties have purchasers interests. The position in this matter is that the estate has been transmitted to the beneficiaries and subsequently transferred to 3rd parties whose rights are protected under **Section 93 (1) of the Law of Succession Act**. Revocation of grant would not serve any useful purpose as the title has changed hands. The applicants were fully aware of the proceedings and never objected to the distribution. The application is an afterthought.

55. I find that the applicants have not brought the application within the ambit of Section 76 of The law of Succession Act to warrant me to order the revocation of grant. They were fully aware of the proceedings they were married and under the Kikuyu Customary Law married daughters are not supposed to inherit.

56. The application is without merit and is dismissed each party to bear its own costs.

Dated at Kerugoya this 19th day of May 2020.

L. W. GITARI

JUDGE