



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION NO. 885 OF 2013

BONIFACE KINYUA KAMUTHIRU.....1ST APPLICANT

ANTHONY MWANGI KAMUTHIRU.....2ND APPLICANT

ALICE WANGU MAMUTHIRU.....3RD APPLICANT

BERNARD MUTUGI KAMUTHIRU.....4TH APPLICANT

PRISCILLA NJOKI WANGARI.....5TH APPLICANT

V E R S U S

EUNICE WANARI WANGUL.....1ST RESPONDENT

JOSEPH W. NGARI MATUKIRE.....2ND RESPONDENT

RULING

1. This cause relates to the estate of Kamuthiru Ngare alias Kamuthuru Ngari (deceased) who died intestate in 1964. Letters of Administration intestate were issued to Joseph W. Ngari Matukire and Eunice Wangari Wangu on 9/9/10 and confirmed on 24/5/2011.

2. A summons for revocation of grant was filed by Boniface Kinyua, Anthony Mwangi Kamuthiru, Alice Wangu Kamuthiru and Priscilla Njoki Wangari. The application is based on the grounds that they are children of the deceased. That the proceedings to obtain the grant were defective in substance. The grant was obtained fraudulently by making of a false statement by the petitioners and concealment from the court of something material to the case. That the grant was obtained by means of an untrue allegation of fact essential in law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

3. The respondent Joseph W. Ngare Matukire opposed the application and filed a replying affidavit sworn on 24/2/2012. His contention is that the deceased was his uncle and was married to Wangu Kamuthiru and had no issues of the marriage. That he is the next surviving person related to the deceased who had indicated that he should get the land. He further deposes that the cause was published in the Kenya Gazette and no objection was filed. He denies the allegations of fraud and concealment of material facts.

4. The court gave directions that the matter proceeds by way of 'viva voce' evidence. The parties tendered evidence in court.

5. Applicants' case

The applicants' claim that the deceased was their father and the 1st respondent is their mother though mentally ill. That the 2nd respondent is not one of their brothers and the chief indicated him as their nephew. That they have been in occupation of the estate since the deceased's lifetime. That the respondents did not inform them when they were filing the succession cause. That they had initially gone to the clan elder and a ruling was made including them as beneficiaries. That the estate should revert back to the deceased to enable them succeed it in a proper manner.

6. 2nd Respondent's case

In his response, he stated that the deceased who was his uncle was married to Wangu Kamuthiru and they had no issues. That the next surviving person related to the deceased is himself and 3 others who did not want to share the estate for reason that the deceased had clearly indicated that he should get the estate. That the applicants are not related to the deceased and neither were they being maintained by the deceased and the 1st respondent was not married to the deceased as claimed. That the applicants should produce their birth certificates to

verify the same. That a gazette notice was published and no objection was filed by any person.

7. Evidence adduced in court;

The 1st applicant states that the deceased was his grandfather and the 1st respondent is his mother. That the 1st respondent was adopted by the widow of the deceased Wangu Kamuthiru since she could not have children. During cross-examination, he refuted the claim that the 1st respondent was married there. Upon being questioned by the court, he stated that he found that he was born in that home and does not know more.

8. The 4th applicant stated that before the deceased died, they paid dowry for the 1st respondent. During cross-examination, he stated that the deceased was his grandfather and the 1st respondent was married traditionally because the wife of the deceased had no children.

9. The 2nd respondent on his part stated that the deceased is his uncle. That he involved the 1st respondent since she had initially asked for a place to stay from Wangu Kamuthiru the wife of the deceased and later she called her children in 2008 when the wife died. That the 1st respondent came to the estate on or about 1987-1988 while the deceased's husband had died in 1964 and he gave her a portion of the estate as way to say thank you. He confirmed that the applicants are still living on the estate. Upon being questioned by the court, he stated that he does not have the application for confirmation of grant or the original chief's letter.

10. Matters not in dispute;

- *The deceased had no children with his wife Wangu Kamuthiru*
- *His wife Wangu Kamuthiru accepted the 1st respondent to live with her on the estate*
- *The applicants were living in the deceased's land together with their mother*

11. Issues arising;

1. Whether the applicants are dependants of the deceased

The dependants share the same last name as that of the deceased Kamuthiru except the 5th applicant whose last name is Wangari. As per the ruling of the clan elders, the 1st respondent was introduced to the clan members as the traditional wife of Wangu Kamuthiru, the widow of the deceased and she legally changed her I.D.

12. The 2nd respondent confirmed that the 1st respondent came to live on the estate from 1988 and still resides therein. This therefore confirms the fact that the wife of the deceased had married her and the children therefore became the dependants of the deceased.

The law of Succession Act defines dependants.

Section 29 of the Succession Act states;

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.*

13. The applicants are dependants of the deceased as defined as they are grandchildren of the deceased. The 2nd respondent is not a dependant of the deceased. He did admit that he is a nephew of the deceased. He has never lived on the estate of the deceased and was therefore not maintained by him. He is not a dependant as defined under **Section 29 of the Law of Succession Act**.

14. The copy of the Chief's letter shows that he was a nephew of the deceased. The respondent admitted that he owns land which he inherited from his father. The respondent had no claim over the estate of the deceased who was his uncle.

15. The applicants had lived on the land and continued to live on the land uninterrupted. The minutes of the clan meeting dated 15/1/2010 found that the 1st respondent was legally adopted by Wangu Kamuthiru the wife of the deceased who had no children. Wangu Kamuthiru swore an affidavit in the Magistrate's court at Baricho to enable Eunice to change her name to that of Eunice Wangari Wangu. She was adopted and therefore her children are dependants of the deceased as grandchildren of Eunice Wangari Wangu.

2. Revocation of Grant:

16. The applicants are seeking an order for the revocation of grant. A grant may be revoked where it is proved that it was obtained fraudulently, or through proceedings which were defective in substance or through concealment from court of something material to the case. The grant may also be revoked if it was obtained by means of an untrue allegation essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. These constitute the grounds upon which the court will order a grant to be revoked. It is sufficient for a party to prove any of these grounds for the court to order the grant to be revoked. Prove of one of the grounds is enough, a party is not required to prove all the grounds. **Section 76(a)(b)(c) of the Law of Succession Act (cap 160 Laws of Kenya)** makes provision for revocation of grant. It 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;

17. The applicants have proved that the proceedings to obtain the grant were defective in substance as the 2nd respondent failed to include the dependants of the deceased. The 2nd respondent concealed something material from court that is the 1st respondent was mentally ill and that she had children. The grant was obtained fraudulently by the 2nd respondent presenting himself as the only beneficiary with 1st respondent and through misleading the 1st respondent that they were going to rectify the title. The 2nd respondent concealed from court that the clan had deliberated on the estate of deceased and recommended that himself and Boniface Kinyua Kamuthiru were appointed administrators of the estate. Instead the 2nd respondent obtained the grant through misrepresentation, concealment from court facts which were material to the case. The grant was obtained fraudulently as the 2nd respondent did not prove that he had applied for confirmation of grant. He could not produce the application and it was not clear how the grant was obtained. He ended up awarding himself a bigger portion than what the clan recommended. This was fraudulent. Furthermore he depones that he has other siblings who he did not disclose when applying for Letters of Administration. The grant was not properly obtained and should not be allowed to stand.

18. I find that the application for revocation of grant has merits. I allow it as prayed. I order that:-

(i) The grant which was confirmed on 13/5/2011 be revoked.

(ii) The applicants are the rightful beneficiaries of the estate of the deceased comprised in Land Parcel No. Mwerua/Kagioini/448.

(iii) The applicants who are the rightful dependants of the deceased shall proceed to apply for Letters of Administration.

(iv) I award costs to the applicants.

Dated at Kerugoya this 14th Day of February 2019.

L. W. GITARI

JUDGE