



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 463 OF 2004

IN THE MATTER OF THE ESTATE OF KAMAU KIRIGITHE alias SAMUEL KAMAU KARIGITHE (DECEASED)

BETWEEN

MARY WAMBURA KAMAU

MARGARET WANJUGU KAMAU.....APPLICANTS

MICHAEL KAMAU)

RUTH WANGECHI MWANGI)

JOSHUA KIRIGITHE KAMAU)..... RESPONDENTS

JUDGMENT

1. The succession cause herein relates to the **Estate of the late Kamau Kirigithe alias Samuel Kamau Karigithe alias Samuel Kamau Karigithe (Deceased)** who died on the 10th July, 1985 at Kimondo Kirerema in Nyeri County; the deceased died intestate and left the following surviving him, namely;

- (i) Wairimu Kamau - 2nd widow
- (ii) Margret Wanjugu Kamau - daughter -1st house
- (iii) Joshua Karigithe Kamau - son -2nd house
- (iv) Ruth Wangechi Mwangi - daughter in law - 1st house
- (v) Mary Wambura Kamau - daughter - 2nd house
- (vi) Michael Kamau - grandson - 2nd house

2. The identifiable property comprising the estate of the deceased is one parcel of land known as Githi/Kirerema/697 measuring 2 acres (the 'subject property').

3. A Grant was issued to Mary Wambura Kamau and Joshua Kirigithe Kamau on the 25th January, 2010 and confirmed on the 17th September, 2010; the Applicants herein filed this application which is premised under Section 47 and 76 of the Law of Succession Act and the provisions of Rule 44 and 73 of the Probate and Administration Rules; the Applicants seek the Revocation of the Grant issued on the aforementioned date on the grounds that;

- (a) The proceedings to obtain the Certificate of Confirmation of the Grant were defective in substance because it transmitted the estate to the persons who were not entitled;
- (b) That the persons to whom the Grant was made have failed to proceed diligently with the administration of the estate;
- (c) That the Grant has become useless as it cannot transmit the deceased's estate to the rightful beneficiaries;

4. The Applicants also relied on the grounds on the face of the application and on the joint Supporting Affidavit made on the same date by **Mary Wambura Kamau and Margaret Wanjugu Kamau**;

5. Directions were taken on the 27/11/2017 that the matter be disposed of by way of the parties filing written submissions; hereunder is a summary of the submissions tendered;

THE APPLICANT'S CASE

6. The application for determination is dated the 16/03/2017; and the dispute on the one hand challenges the proceedings to obtain the Certificate of Confirmation of Grant as being defective in substance and on another arm it challenges the distribution of the deceased's estate which comprises of one property which is the subject property; it is the Applicant's contention that Joshua Kaigithe Kamau, Ruth Wangechi Mwangi and Michael Kamau Karigithe are not entitled to benefit from the estate of the deceased;

7. Their evidence is that the Grant was obtained secretly and without the Applicants' consent and knowledge on the mode of distribution; the Applicants also took issue with the omission of the 1st Applicant as one of the beneficiaries to the deceased's estate yet she is a daughter and a surviving child of the deceased and that Michael is her son; and being a daughter of the deceased she stands in better stead than a grandson;

8. That during his life time the deceased owned the parcel known as Githi/Kirerema/398 which measured approximately six (6) acres and he caused it to be sub-divided and created three (3) equal parcels which were;

(i) Githi/Kirerema/695

(ii) Githi/Kirerema/696 and

(iii) Githi/Kirerema/697

9. The deceased before his demise had distributed his *estate inter-vivos*; the parcel Githi/Kirerema/695 was transferred to Joshua Kirigithe Kamau and the parcel Githi/Kirerema/696 was transferred to the family of John Mwangi Kamau (deceased); the 1st, 2nd and 3rd respondents were not entitled to the remaining portion that is Githi/Kirerema/697 (which is the subject property) as it had been reserved for the female children who are the Applicants herein;

10. This latter parcel was to be divided into two (2) equal portions of 0.45Ha; that their proposed mode of distribution was fair and just; the two Applicants were to benefit only and were to get equal shares; that Michael the 2nd Respondent herein had filed a written notice that he was not interested in the estate of the deceased and had renounced his rights in his portion to his mother who is the 1st applicant;

11. That one of the key duties of a personal representative as set out under Section 83 is that within six (6) months from the date of the grant one of the administrators was to produce to court an accurate inventory of the assets and liabilities of the deceased and they were also to give an accurate updated account of the dealings therewith;

12. The Respondents were also obligated under the law to ensure that the subject property was distributed to the beneficiaries who did not benefit from the estate during the lifetime of the deceased; the applicants relied on the provisions of Section 42 of the Law of Succession; the Applicants prayed that the Grant be revoked as it had been obtained secretly without the Applicants' knowledge or consent on the mode of distribution; that the Respondents had misled the court into distributing the estate; and had tendered no evidence to demonstrate that the Applicants participated in the proceedings for confirmation;

13. The Applicants submitted that the deceased's wishes were clear and should be preserved and that the court make a finding that the Applicants are entitled to the subject property;

THE PETITIONERS RESPONSE

14. In response the 1st Respondent stated that the Application is premised under no particular sub-section of Section 76 of the Law of Succession Act; and that the application was misplaced as the section does not provide for a ground that the estate was not transmitted to persons who were not entitled; he submitted that he had diligently pursued the cause and to have the estate transmitted; that the Applicants had been active participants in the succession proceedings since 1986 when it commenced in the subordinate court and was later transferred to the High Court;

15. The 2nd Applicant is a beneficiary and as per the Certificate of Confirmation she was awarded 0.5 Acres of the subject property; her son the 3rd Respondent herein was also awarded 0.5 Acres; so as to avoid further acrimony the 3rd Respondent renounced his interest in the subject property and requested that his portion vests in his mother;

16. The 1st Applicant and her co-Applicant have been the main obstacles and the authors of any delay and had declined to execute documents and to provide the requisite documents;

17. If the parties were dis-satisfied with the mode of distribution they were at liberty to appeal and he reiterated that the Application for revocation was misplaced and was not available; that the Application be dismissed with the Applicants being condemned to pay costs.

ISSUES FOR DETERMINATION

18. Having read the rival written submissions these are the issues framed by this court for consideration;

(i) Whether the Applicants participated in the proceedings to obtain the Grant;

(ii) Whether the proceedings to obtain the Grant and the Certificate of Confirmation were defective on the grounds of transmission to persons not entitled;

ANALYSIS

19. The two applicants who are daughters of the deceased filed summons for revocation of the Grant under the provisions of Section 76 of the Law of Succession; the revocation sought was on the grounds that the Grant obtained was defective because the deceased's estate had been transmitted to persons not entitled;

Whether the applicants participated in the proceedings to obtain the Grant:

20. In addressing this issue there is need to set out at length the history of this succession cause; the deceased died intestate on the 10th July, 1985 and the persons who petitioned for the grant to administer the estate of the deceased were Wairimu Kamau (**'Wairimu'**) and Margret Wanjogu Kamau (**'Margret'**); Wairimu described herself therein as the wife of the deceased and was aged 65 years in 1986 when she filed the petition; Margret was the co-petitioner and therein described herself as the daughter of the deceased; together they filed Succession Cause No. 66 of 1986 in the subordinate court at Nyeri;

21. They listed only one asset which was Githi/Kirerema/697 the subject property herein in the succession cause; it is not disputed that this parcel of land is a sub-division of Githi/Kirerema/398 which measured approximately six (6) acres and that the deceased had it sub-divided and created three (3) equal sub-divisions which were;

(i) Githi/Kirerema/695

(ii) Githi/Kirerema/696 and

(iii) Githi/Kirerema/697

22. It is also not disputed that the deceased had distributed a portion of his *estate inter-vivos* to two of his sons; the parcel Githi/Kirerema/695 was transferred to Joshua Karigithi Kamau and the parcel Githi/Kirerema/696 was transferred to the family of John Mwangi Kamau (deceased); that only the subject property was not gifted to anyone and is the only parcel that is now available for distribution;

23. The 1st Respondent filed a Notice of Objection on the 2nd April, 1986 on the grounds that the deceased had two (2) wives; his grounds for objecting were that he was a son of the deceased and his deceased mother was the first wife of the deceased; and that he had an interest in the estate and also had an equal right to petition for a grant of representation because before his father had died he had orally appointed him as the head of the family; he submitted that this was a fact that all the family and clan members were aware of; he then proceeded to file a Cross-Petition;

24. Wairimu then filed an Application that the matter be referred to the District Officer Mukuruweini for arbitration; the only issue set for arbitration was the mode of distribution of the subject property; on the 21/11/1986 the Deputy Registrar entered a **'BY CONSENT ORDER'** sanctioned by all the parties referring the matter to the D.O Mukuruweini to hear and determine the issue of distribution; the award was read in court on the 30th May, 1988 and was duly adopted as an order of the court after 30 days;

25. Wairimu being aggrieved with the Award filed an Application on the 16/06/1988 in which she sought to set aside the award on the grounds that the arbitrator had misconducted himself by disregarding vital evidence; this application was resolved vide a Consent Letter dated the 9th August, 1988 which stated that Wairimu and the 1st respondent had mutually agreed that the subject property be sub-divided into four equal shares; the four portions were to be transmitted to Wairimu, Joshua Karigithi Kamau, John Mwangi Kamau and Margret Wanjogu Kamau each to get 0.5acres; the parties also agreed that none of them would lodge an appeal relating to this matter;

26. The matter was then transferred to the Chief Magistrates at Nyeri and on the 4/03/1992 a Grant and a Certificate of Confirmation were issued; what is interesting to note is the first misstep which was the omission of the names of the legal representatives on the Grant as well as the Certificate of Confirmation which instead bore the remarks **"SEE THE ATTACHED ORDER"** appearing on both of the documents;

27. Due to the above stated omissions the parties then ran into headwinds when they tried to effectuate the transmission of the deceased's estate; all the parties were beneficiaries and there was no administrator; and it is trite law that only the administrator is legally mandated to effect a transmission of a deceased estate; in an attempt to cure this anomaly the 1st respondent filed an Application dated the 21st September, 2004 seeking orders that the court do nominate the executive officer to execute all documents to facilitate registration, sub-division and transfer of the respective heirs interest in the estate; he also sought orders that the production of the original Title Deed be dispensed with; this application was dismissed by Khamoni J on the 26th October, 2005 as the Applicant therein had failed to cite the specific provision of the law or rules that empowered the court to appoint the executive officer or any other officer of the court to perform the duties of an administrator;

28. The 1st Applicant also filed an Application dated the 24th February, 2010 for the review of the order of 4th March, 1992 as there was an error apparent on the face of the record that made the Certificate of Confirmation incapable of being effected as there was no one named to

effect the same; another misstep was during the period running from 1986 to the issuance of the Certificate of Confirmation on 17th September, 2010 the Succession Cause had never been gazetted therefore there was no Grant; this necessitated the making of an Application for such an order which the 1st Respondent duly filed on the 10th February, 2014; finally the parties obtained an order dispensing with the gazette notice and the Grant was then jointly issued to the 1st Applicant and the 1st Respondent;

29. When the 1st Applicant refused and or neglected to execute the transmission documents the 1st Respondent successfully applied and this time round obtained orders to have the Deputy Registrar of the court to execute the transmission documents.

30. That sums up the history and state of affairs of the succession cause; and upon perusal of the court record at length this court is satisfied that despite the numerous missteps referred to herein, the multiplicity of the Applications made by the rival sides are a clear indication that Wairimu on behalf of the 1st Applicant and the 2nd Applicant fully participated and had full knowledge of the proceedings herein that led to the obtaining of the Grant;

Whether the application is properly before this court:

31. The instant application for revocation which is brought by the Applicants under the provisions of Section 76 of the Law of Succession Act; the section sets out the grounds upon which a Grant can be revoked; and reads as follows;

“Section 76

(a) The proceedings to obtain the grant were defective on substance.

(b) The grant was obtained fraudulently by the making of false statements or concealment of something material the case.

(c) The grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

32. The Application it is noted does not cite the specific sub-section in their Application; and their first contention is that the proceedings to obtain the Certificate of Confirmation of the Grant were defective in substance because it transmitted the estate to persons not entitled to;

33. In the aforementioned Ruling dated the 26th October, 2005 made in this instant cause by the Honorable Khamoni J the following observation was made;

“The Law of Succession Act, provides a solution at least under Section 76, not the whole of that Section as many Applicants annoyingly do, as one needs to look at and use the relevant paragraph/paragraphs only, to make oneself clear and precise as it to be.”

34. As correctly pointed out by the Respondents in their submissions the Application was made under no specific sub-section; this court reiterates the observation made by the Honourable Khamoni J ***“that it is important to make a clear and precise application under the provisions of Section 76”***;

35. This court finds that the Application as it stands is incompetent as it is neither clear or precise and is also not premised on any of the provisions cited; which brings this court to the next issue where it will be further elaborated why this instant Application is not properly before this court;

Whether the distribution to persons not entitled to the deceased’s estate:

36. Further the issue of persons not entitled to benefitting from the estate of the deceased also does not obtain for the following reasons; Section 29(a) of the Law of Succession Act sets out the category of persons who are entitled to benefit from the estate of a deceased person; the section provides as follows;

“29. For the purposes of this Part, “dependant” means

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

37. It is not disputed that Wairimu was the 2nd wife of the deceased; there is also overwhelming evidence on record that the 1st Applicant and the 1st Respondent are children of Wairimu and the deceased; the record reflects that Wairimu participated in the arbitration process carried out by the District Officer Mukuruweini; and on the 9/08/1988 all the parties namely Wairimu, the 2nd Applicant, the 1st Respondent and John Mwangi Kamau (deceased) signed a consent letter on the mode of distribution which was adopted as an order of the court; which order has never been set aside or appealed against;

38. Wairimu then filed an Application ceding her portion of 0.5 acres to the 1st Applicant herein; it is not disputed that the 1st Applicant had been left out and her son (the 2nd Respondent) who is a grandson included in the distribution as opposed to his mother; by ceding his interest to his mother by way of a written Notice of Renunciation, the issue of the exclusion of the 1st Applicant is deemed as having been settled;

39. Margret Wanjugu Kamau the 2nd Applicant and John Mwangi Kamau (deceased) are children from the first house; both were apportioned 0.5 acres each as per the agreement of 9/08/1988; upon the demise of John his widow who by dint of Section 29 of the Act can be described as a daughter in law of the deceased was rightfully given John's portion which is as reflected on the Certificate of Confirmation of the Grant;

40. This court is satisfied that the 1st and 3rd respondents qualify to be described as dependant's and are entitled to benefit from the estate of the deceased; and the 2nd applicant is also a beneficiary to the deceased's estate;

41. This court is satisfied that the distribution was to persons entitled to benefit from the estate of the deceased;

Whether Section 42 of the Law of Succession is applicable;

42. The Applicants went further and invoked the provisions of Section 42 of the Law of Succession which sets out the principle of equity; it is not disputed that the deceased was the original parcel of land known as Githi/Kirerema/398 which measured approximately six (6) acres and that the deceased had it sub-divided and created three (3) equal sub-divisions which were;

(iv) Githi/Kirerema/695

(v) Githi/Kirerema/696 and

(v) Githi/Kirerema/697

43. It is also not disputed that the deceased had distributed a portion of his estate inter-vivos to two of his sons; parcel Githi/Kirerema/695 was transferred to Joshua Karigithe Kamau and parcel Githi/Kirerema/696 was transferred to the family of John Mwangi Kamau (deceased); the only property that was not gifted inter-vivos was the subject property;

44. Unfortunately, this court is unable to be of any assistance to the Applicants as no valuation reports were prepared and filed with respect to the properties that were gifted by the deceased *inter-vivos* nor were the subdivisions of the subject property valued and a report prepared; in the absence of such valuation reports any decision made will be speculative and thus no informed decision can be arrived at by this court;

45. This court opines that the proper Application which the Applicants ought to have filed was for the review of the orders made on the 17th September, 2010 to correct the anomaly of omission of the 1st applicant;

FINDINGS AND DETERMINATION

46. From the afore-going reasons this court makes the following findings that;

(i) The Application is neither clear or precise and is not properly before this court;

(ii) The Applicants are found to have participated in the process of obtaining the Grant and had full knowledge of the proceedings herein;

(iii) The distribution was to persons entitled to benefit from the estate of the deceased; the 1st Applicant too is entitled to benefit and the issue of her omission is deemed having been duly settled;

(iv) This court orders that the Certificate of Confirmation be rectified to remove the name of Michael Kamau the 3rd Respondent and his portion be allotted to the 1st Applicant;

(v) This court finds that in the absence of Valuation Reports the principle of equity cannot be properly addressed;

(vi) The Application for Revocation of the Grant is found lacking in merit and is hereby dismissed;

(vii) The parties be at liberty to apply for further directions;

(viii) Each party shall bear their own costs.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 7th day of February, 2019.

HON.A.MSHILA

JUDGE