



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

P&A CASE NO. 114 OF 2002

IN THE MATTER OF THE ESTATE OF THE LATE ANTHONY KAROKI GITAHU (DECEASED)

ZIPPORAH GAKII KAROKI PETITIONER

VERSUS

ROBERT EDWARD GITAHU OBJECTOR

JUDGMENT

Anthony Karoki Gitahi, the deceased herein, died intestate on 22.03.2002. The Petitioners Zipporah Gaki and James Ngari Gatahi filed a Petition for grant of letters of administration on 27th June 2002, the same was published in the gazette on 12th July 2002 vide gazette notice 4403. The Petition lists Zipporah Gaki as the wife. The other dependants listed are;

Brian Gataki Kariuki as a son

Jackson Mwitii Kariuki as a son

Edward Gatahi Kariuki as a son.

The objectors lodged their objection to the grant pursuant to the provisions of *Rule 17(1) of the Probate and Administration Rules and Section 68 of Cap 160 of the Laws of Kenya* on 16th July 2002.

OBJECTORS' CASE

The objector testified in court as the only witness in support of his case. In his testimony he stated that he was a son of the deceased. He was born to Hellen Nyambura at Pumwani Hospital in 1970. He spent his childhood in Karatina, Nyeri for 4 years before the deceased and his mother relocated to Nairobi. Around 1973-74 the deceased went abroad leaving him in custody of his mother.

In the year 1999 the deceased sent the objectors' maternal aunt, Teresia Wambui to find him and invited him to visit him at Kapsoya estate. When he went to visit him, his father invited him to live with him. They lived together for one and half months after which his stepmother, the 1st Petitioner, joined them.

Two weeks after her arrival they disagreed and he went to live with his aunt Teresia and later on he moved to Langas to live on his own.

His father fell sick and the objector visited him. He invited the objector and his family to live with him. He then told the objector to move to the plots in Huruma where he was to manage the family business. The objector relocated after the deceased's death and occupied the Huruma plots without any disturbance from his step mother.

The objector testified that he lived with the deceased in Kapsoya at the time of his death. The deceased died on 22nd March 2002 at the Kapsoya home. He was buried in Karatina, Nyeri where his step mother Lucy N. Mumu and Zipporah Gaki were present. He was introduced as a son of the deceased.

He was introduced to Lucy Nyaguthii Mumu in late 2000 as his stepmother and never met her siblings until after the death of the deceased. He was also photographed with other family members and mentioned in the obituary as one of the deceased's children.

He told the court that his paternal mother recognized him as a grandchild and the deceased had introduced the two in 2000 in the presence of two paternal aunts. They never testified in the proceedings.

He testified that in the affidavit in support of the petition, P&A 5 filed on 27th June, 2002, he was listed as a son of the deceased by the Petitioners. The 2nd Objector was however not included and neither were her children.

He submitted that the deceased had the following assets prior to his death;

- (a) Eldoret Municipality Block 9/586 with a house measuring approximately ¼ of an acre.
- (b) Eldoret Municipality Block 6/312 with semi-permanent houses.
- (c) Huruma Plots No. 170 and 219 with rental houses.
- (d) Tairi Mbili plot 2996 measuring approximately ¼ of an acre.
- (e) Motor Vehicle registration number KHA 74 Peugeot 404.
- (f) Motor vehicle registration number KSA 222 Mercedes Benz Saloon.
- (g) Motor vehicle registration number KAK 001 Isuzu 3.6
- (h) Motor vehicle registration number KAP 807A Toyota Hilux Pick Up
- (i) Account at Standard Chartered Bank.

The objector sought that the court divides the estate in three and he be considered as representing the 1st house.

He cited *Section 29 of Cap 160*, stating that it has not been disputed that he was a son of the deceased and neither was it disputed that his mother and father lived together before the deceased left for the UK. It is also not disputed that he lived with the deceased prior to his death in Kapsoya.

He contended that the allegation that he was to inherit from a Kamau, who his mother allegedly married, was not proven as there was no such person produced to prove that he had acquired parental responsibility over him.

The 2nd Petitioner, James Ngari Gitahi, told the court that he was the deceased's younger brother. He confirmed that the objector was born to his brother and that the objectors' mother was introduced to the family as his girlfriend. He also confirmed that the objector was left behind with his mother when the deceased left for the UK.

PW1 also told the court that he saw the objector in 2000 when he and the deceased visited their home in Nyeri.

In cross examination, PW1 confirmed that the objector was the son to the deceased and that when the deceased left for the UK he left the objector and his mother at his parents' home.

PETITIONERS' CASE

The petitioner did not file any submissions in support of their petition.

Counsel for the petitioner stated in court that the issue in contention was that the objector was the son of the deceased out of wedlock and that his mother had married and acquired a name in another home therefore his rights lay with his new father, Kamau and thus denied him a legal right to the estate.

The petitioner testified, as DW, that the deceased married her in 1997 and he did not have another wife. They married in Eldoret and had 2 children; Brian Gatahi and Jackson Mwitii.

She is aware of the properties listed by the objector and testified that she sold the 5 vehicles to pay school fees for the children. She however did not produce any records of the sales or proceeds therefrom.

She denied knowing the objector or ever finding him living with the deceased. She denied being told that he was the son of the deceased and she claimed to only have met him when the deceased was sick.

She recalled attending a meeting where she was told that the objector was the deceased's son but she was never told how. She further testified that one of her brothers swore an affidavit indicating that though the deceased was the biological father of the objector, he never married his mother.

The petitioner testified that the objector occupied the Huruma Plots and refused to leave and he began collecting rent for 10 years after which the houses fell into disrepair and he abandoned them.

In 2012 she took control of the properties and did repairs. She had tenants in all the houses and continued to do repairs. The plot

ELDORET/MUNICIPAL/BLOCK 6/312 has tenants who pay rent of between Kshs. 500-800 per month. She also confirmed that there is an account in Standard Bank No. xxxxxxxxxxxx from which the court had allowed her to withdraw school fees for her children.

She also relied on the eulogy as proof that she was the only widow.

She testified that the objectors' ID showed that his father was Kamau. According to her, the brothers are the ones who insisted that the objector be included as a son in P&A 5. She acknowledged that she never asked the court to evict the objector from the Huruma plots.

The 2nd objector, who later on withdrew her objection; Lucy Nyaguthii Mumu was called to testify as a witness of the petitioner. She confirmed that she knew the deceased in 1986 and they lived together for 2 years after which she was transferred to Nakuru. They moved to the Huruma Plot No. 170 where they lived for 10 years. The plot was in the deceased's name.

They did not get married formally. In 1988 when they went to Nyeri, they met his mother to whom she was introduced as his wife. They had 2 children born on 28th September 1987 and 30th September 1993. She produced their birth certificates which were marked as MFI 1 and MFI2. The deceased paid school fees for the children and she produced receipts in court proving the same.

She confirms having met the objector in 2000 and that he lived with the deceased in Kapsoya. She disclosed the assets she was aware of in an affidavit dated 14th August 2002.

She attended the deceased's funeral and confirmed having seen the objector there. She also confirmed that he was included in the death notice marked as exhibit 8. She visited him in Kapsoya, at house No. 580 when he was unwell and met the objector there. This was in January 2002. She stated that the deceased had 5 plots and 5 vehicles which were in custody of the 1st petitioner. She further confirmed that the Huruma plots 170 and 219 were in the possession of the objector. She had no property and asked that the estate be divided amongst herself, the objector and the 1st Petitioner, Zipporah Gaki.

She confirmed that the deceased had told her the objector was his son and that he was included in the Eulogy.

PW2 Moses Kinuthia Mbugua testified that he knew the deceased and was his friend from 1987. He was present when he bought the 2 plots in Huruma. He confirmed that the deceased did not live with Lucy Nyaguthi at Huruma and he never saw them together. In 1999 he introduced the objector to him as his son. In 1998 the deceased then married the petitioner and took her from Huruma to Kapsoya.

He stated that the deceased had 5 vehicles, one of which was grounded. These vehicles were a canter, Toyota Pick Up, Mercedes Benz, Nissan Sunny b-12 and a Peugeot 404 which was grounded.

DOCUMENTS

There are documents that have been presented to the court that shall be considered in making a determination.

The affidavit in support of the petition sworn by the Petitioners and filed on 27th June 2002 include the objector as a dependant of the deceased.

The 2nd objector also filed an affidavit on 27th January 2003 with the birth certificates of Linda Gathoni and Fiona Wandia marked as exhibits. The birth certificates indicate that the deceased was the father to her 2 children.

The petitioner filed an affidavit on 28th September 2010 deponing that the objectors statement showing that there was an income of Kshs.15,000 from the houses in Huruma was incorrect but she failed to provide evidence in support of the same.

On 21st June 2011, the deceased's brother, James Ngari Gitahi admitted that the objector was the deceased's son but stated that the objector had another father based on the inclusion of the name Kamau on his identity card.

The objector filed a replying affidavit on 13th July 2011 where he denied the allegations of having a father by the name Kamau.

ISSUES FOR DETERMINATION

- (a) Whether the objector is a dependant for the purposes of administration of the estate.
- (b) Whether the grant should be revoked

WHETHER THE OBJECTOR IS A DEPENDANT

According to *Section 29 of the Law of Succession Act*;

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.

The Petitioners' witnesses have admitted that the objector was introduced to them as his son, particularly his brother who is the 2nd petitioner and one Moses Kinuthia Mbugua who was also a close friend of the deceased.

Further, the Petitioners included the 1st petitioner as a son in the affidavit in support of the petition filed on 27th June 2002. The petitioners' advocate is also on record stating that the issue in dispute was not whether the objector was the deceased's son but whether he has rights to the estate of the deceased as he has a father by the name Kamau who married his mother.

The Petitioners' failed to prove on a balance of probabilities that there actually existed a Kamau and further, that he was married to the mother of the objector. Having the name Kamau on his identity card is not sufficient proof that the objector has a father who has/had parental responsibility over him. The burden of proof is on he who alleges and one would expect that the petitioners would have pursued this particular aspect of the case more thoroughly as it would have proved that he was not entitled to the estate.

Based on the evidence tendered in court and the affidavits sworn by the petitioners in support of the petition, and the affidavit sworn by the deceased's brother, the 1st objector is a dependant for purposes of administration of the estate.

The 2nd objector who has since withdrawn her objection and her children can also be considered dependants under *Section 29(a)* of the *Act*. From the evidence tendered in court, it is clear that the deceased was the father of the 2 issues as per the birth certificates. Further, he was responsible for their maintenance and upkeep as evidenced by the receipts of school fees paid for the 2 issues.

WHETHER THE GRANT SHOULD BE REVOKED

According to *Section 76* of the *Law of Succession Act*;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 order or allow; 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
 - (iv) That the grant has become useless and inoperative through subsequent circumstances.

The applicable section to this cause is *Section 76(b)*. The 1st objector contends that the 2nd Objector was considered a wife and also had children with the deceased evidenced by the birth certificates.

For a grant to be revoked, one of the conditions set in *Section 76* must be satisfied.

In the matter of the *Estate of L A K – (Deceased) [2014] eKLR* the court held that;

“Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

It is clear that the children of Lucy N. Mumu were not included as beneficiaries to the estate yet there is evidence of the deceased being their father. The objector has established his case which warrants the revocation of the grant dated 15th July, 2002. The said grant is therefore revoked with cost to the objector.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of June, 2019.

In the presence of:-

Mr. Kimata for petitioner

Ms. Isiaho for objector

Ms. Sarah - Court clerk