



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MISC.SUCCESION CAUSE NO.2 OF 2017

IN THE MATTER OF THE ESTATE OF MARY WANGUI KANOTHA (DECEASED)

A N D –

JOSEPH GITONGA KANOTHA.....OBJECTOR/APPLICANT

- V E R S U S -

ZAWERIA WANJIRU KANOTHA.....PETITIONER/RESPONDENT

JUDGMENT

This matter relates to the estate of **Mary Wangui Kanotha** who died intestate on 20/11/1999 at Kitiri Scheme in Nyandarua. She was survived by her children:

- 1. Charles Ng'ang'a Kanotha (deceased)**
- 2. Zaweria Wanjiru Kanotha**
- 3. Joseph Gitonga Kanotha**
- 4. Susana Warima Kanotha**
- 5. Hannah Wanjeri Kanotha**

At the time of death, Mary Wangui Kanotha was registered as proprietor of Nyandarua/Kitiri/767, 769 and 770.

Zaweria, the petitioner/respondent, filed Nyahururu Principal Magistrate Succession Cause No.49 of 2000 and was issued with letters of administration intestate for the Estate of Mary Kanotha. A certificate of confirmation was issued to Zaweria on 17/8/2000 and confirmed on 14/12/2001.

On 2/9/2014, the objector/applicant Joseph Gitonga Kanotha, a son to the deceased and brother to Zaweria filed a summons for revocation or annulment of grant in which he sought the following orders:

- 1. That the grant of letters of administration intestate and consequential certificate of confirmation issued on 14/12/2001 in Nyahururu PMCC Succ.49/2000 to Zaweria Wanjiru Kanotha be revoked and the deceased's estate be devolved in terms of paragraph 3 of the affidavit filed by the objector;**
- 2. That the registration of the respondent as the absolute proprietor of LR.Nyandarua/Kiriti/767, 769 and 770 pursuant to the certificate of confirmation of grant issued in Nyahururu PMCC Succ.49/2000 be revoked;**
- 3. That the appellant be appointed as the administrator of the deceased's estate in place of the respondent, Zaweria and costs of the application be provided for.**

The application was based on the following grounds:

That the proceedings to obtain the grant were defective; that the grant was obtained fraudulently by making of false statement or concealment from the court of material facts relevant to the issue of distribution of the deceased's estate; that the objector was not notified of the said cause nor was his consent sought before the grant was issued to the respondent despite the fact that being children of the deceased, they ranked in equal priority with Zaweria; that the value of the deceased's estate exceeded the pecuniary jurisdiction of the subordinate court and the grant is therefore null and void; that the registration of Zaweria as the absolute proprietor of LR Nyandarua/Kitiri/767, 769, 770 is fraudulent, null and void and went against the certificate of confirmation of grant issued on 14/12/2001.

Zaweria filed a replying affidavit on 7/7/2015 opposing the said application. On 19/7/2015 directions were taken that the application for revocation of grant do proceed by way of viva voce evidence and counsel were directed to file their respective witness statements.

On 15/11/2016, the objector filed three statements of Joseph Gitonga Kanotha, Raphael Kariuki Ng'ang'a and Teresiah Wangare Ng'ang'a while the respondent filed witness statements of Zaweria Wanjiru Kanotha, Mary Atieno and Mary Wambui Ng'ang'a.

Joseph Gitonga Kanotha the other objector testified as PW1. He is a son of the deceased and a brother to Zaweria, the respondent. He recalled that their father, Kanotha Ng'ang'a Ngure died in 1994 but before his death, he had subdivided his land Nyandarua/Kitiri/340 which measured 16.5 Ha (40.7 acres) into 4 portions 767, 768, 769 and 770. PW1 produced a copy of the green card (P.Exh.1). PW1 said that Plot 767 was given to his brother Charles Ng'ang'a (deceased) measuring 10 acres; that his father remained with plot 768; that he was given plot 769 and 770 was given to his sisters to share if they came back home. He produced green cards for the said lands P.Exh.2 – 5; that the father died in 1994 before he transferred the lands to the names of his children. Upon his death, the mother Mary Kanotha applied for letters of administration and the pieces of land were transferred to her name; that by then, the father had sold plot 768 to Richard Kibiru and transferred it to the buyer on 15/9/1998. That the said land has since changed many hands as seen from the green card.

PW1 said that his deceased brother Charles Ng'ang'a was not included in the list of beneficiaries by Zaweria; that his three sisters are using plot 770; that when he came home from Nairobi, Zaweria told him that he had no land as he had sold his but he denied having sold any land. PW1 found out that Zaweria had filed a Succession Cause in respect of the mother's estate without informing any of the other siblings.

He also denied ever signing the consent agreeing to confirmation of grant. He reported the matter to DCIO Nyahururu for investigation but he was told that he was not truthful.

PW1 said that Raphael Kariuki Ng'ang'a his uncle who had recorded a statement as to having witnessed the distribution of the land by PW1's father, died before he could testify. PW1 urged the court to distribute the land how the father wanted them to share. He further stated that the subject land was over 30 acres and was valued at much more than Kshs.100,000/=, therefore, the Principal Magistrate court did not have jurisdiction to determine it.

PW2 Teresia Wanjiru Ng'ang'a told the court that she is the wife of Charles Ng'ang'a (deceased) who was a brother to PW1 and Zaweria. She confirmed that the deceased was survived by 2 sons and 3 daughters; that when her husband, Charles Ng'ang'a was alive, she lived at Kitiri together with her father and mother in law; that before the father in law died, he had subdivided his land into 4 portions of 10 acres each and her portion was 767; that 768 belonged to her father in law, 769 belonged to the objector while 770 was given to the girls to share. She said that she has hired out her land. She denied that PW1 has sold any land. She too denied having been notified that succession suit was being filed. She also denied knowing that her husband ever had a second wife and a son.

DW1, Zaweria Wanjiru, a sister to PW1 confirmed that they were 5 siblings and the deceased was her mother; that the father Kanotha Ng'ang'a Ngure died on 26/9/1994; that their father owned land Nyandarua/Kiriti/340 which he further subdivided into four portions of 10 acres each and gave his children as follows:

Plot 767 to Joseph Gitonga, the objector;

Plot 768 to given to Charles Ng'ang'a (deceased);

Plots 769 and 770, the remaining 20 acres were left to the three daughters, that is:

- i. Zaweria Wanjiru Kanotha
- ii. Hannah Wanjiru Kanotha
- iii. Susana Warima Kanotha

DW1 produced the mutation dated 2/9/1986 in which plot 340 was subdivided into 4 (D.Ex.no.1); that upon Kanotha Ng'ang'a's death, the deceased Mary Kanotha filed a Succession Cause where grant was confirmed to the deceased on 6/11/1995 (D.Ex.2) and the land was transferred to the her. The deceased, Mary Kanotha died on 20/11/1999; that when her brother Charles Ng'ang'a died in 1987, the wife sold his portion plot 768 to a school before the deceased's death; DW1 said that they filed Succession Cause No.49/2000 in Nyahururu, were issued with confirmed grant; that all her surviving siblings were notified of the proceedings and that the land was transferred to her to hold in trust for her siblings. She produced the grant dated 14/12/2001 as an exhibit (D.Ex.No.3) and the titles were issued to her on 15/6/2003 and are still in her names.

DW1 said that at one time, PW1 was arrested. He had no money and he got somebody to buy his 5 acres of land but could only afford 2 acres and another buyer got 3 acres. She produced a sale agreement dated 25/10/1993 D.Exh.5; that the buyer of 2 acres later demanded his money back and she paid him as per agreement dated 11/12/2000 (D.Ex.1).

She also returned the sale money to Wachira Njuguna who had bought 3 acres. D.Ex.7, an agreement between Zaweria and Gachure Njuguna; that PW1 later sold the remaining 5 acres to Mary Wambui as per undated agreement between Kanotha Ng'ang'a and John Ng'ang'a Njoroge (D.Ex.108); DW1 testified that the said Mary Wambui lives on the land. Though the said Mary Wambui had written a witness statement, she did not testify in court. DW1 said that after PW1 reported the issue to DCI, investigations were carried out and she was vindicated. DW1 said that presently, PW1 has leased out the whole 20 acres and she requested the court to order that PW1 do vacate the land left to the deceased's daughters. DW1 further stated that she is ready to subdivide Plot 767 between Mary Wambui but PW1 had placed a caution.

In cross examination, DW1 admitted that the sale agreements of land were never in PW1's names, that is, D.Ex.5, 6, 7 and 8.

Mary Atieno Otambo (DW2) testified that she was married to Charles Ng'ang'a Kanotha, the eldest son of the deceased in 1976 till he died in 1987 and they were blessed with a son Andrew Kanotha.

DW2 further stated that she was aware that Charles Ng'ang'a had another wife who lived on the land at home while she lived with him in Nairobi; that Charles was given Plot No.768; that 20 acres was left to DW1 to hold in trust for the sisters.

DW2 said she attended Charles' funeral; that she was given a plot in Dandora while Charles's first wife sold Plot 768. She denied having any claim over the deceased's land. She produced a birth certificate for the son D.Ex.10.

After duly considering the testimonies of the witnesses and submissions by both counsel, the issues that seem to arise for consideration are:

- 1. Who are the beneficiaries of the deceased's estate;**
- 2. Whether the petition was filed without the knowledge of all beneficiaries and hence null and void;**
- 3. Whether the grant was obtained fraudulently and with concealment of material facts and hence defective;**
- 4. Whether the Principal Magistrate's court had jurisdiction to deal with this Succession Cause;**
- 5. Whether grant should be revoked;**
- 6. How should the deceased's estate be distributed;**
- 7. Who bears the costs.**

It is not disputed that the deceased had the following children:

- 1. Charles Ng'ang'a Kanotha**
- 2. Zaweria Wanjiru Kanotha**
- 3. Joseph Gitonga Kanotha**
- 4. Susana Warima Kanotha**
- 5. Hannah Wanjiru Kanotha**

This matter was first filed in the Principal Magistrate's Court Nyahururu in Succession Cause No.49 of 2000. It is the petitioner who filed the cause and listed herself, Susana Warima Kanotha, Joseph Gitonga Kanotha and Hannah Wanjiru Kanotha as the deceased's beneficiaries. I have perused the court file but have not seen the Chief's Letter or any evidence to show that all the beneficiaries were aware that Zaweria was filing the Cause. No consent of the beneficiaries was filed in court in terms of Rule 40(8) of the Probate and Administration Rules.

Although DW1 filed this cause in the P.M.'s Court, it is not in dispute that the land the subject of this cause is about 30 acres. The jurisdiction of the P.M.'s Court by then was Kshs.100,000/=. Although no valuation report was filed, I doubt that 30 acres of land would have cost less than Kshs.100,000/= by the year 2000. To confirm my conviction, Zaweria annexed an agreement D.Ex.8, between Kanotha Ng'ang'a Ngure and Joseph Ng'ang'a Njoroge, 5 acres of land was being sold for 325, 000/-. The agreement was not dated but the balance was to be paid on 31/10/1994, meaning that the land was sold before October, 1994.

The estate comprising 30 acres must have been valued much more money and the trial court should have enquired into that fact before proceeding to determine the cause. I am convinced that the P.M.'s Court had no jurisdiction to entertain the matter and hence all the orders that were made were so made without jurisdiction.

In the summons for revocation, the objector contends that the petitioner made false statements or concealed material facts from the court in that his consent was not sought before confirmation, the names of Teresa Wanjiru Ng'ang'a, the widow of Charles Ng'ang'a were omitted and that though the court ordered that Zaweria holds the property in trust for her siblings, she transferred the plots 767, 769 and 770 from her mother's names to her names absolutely.

I have seen the confirmed grant dated 14/12/2001. It clearly indicates that Zaweria Wanjiru Kanotha was to hold the land in trust for herself and the children. It was not specified which children.

However, a look at the green cards indicates that Plot 767, 769 and 770 were transferred to Zaweria absolutely. No explanation has been given why the lands were transferred to Zaweria as absolute proprietor, contrary to that Court's Order. If DW1 was genuine, she should have had the titles amended.

There is also no evidence to demonstrate that Zaweria's other siblings consented to the transfer of the lands to her as the administrator. No consent was filed with the application in terms of Rule 40(8) of the Probate and Administration Rules. I have seen the proceedings of 11/2/2001. There is no evidence that any other beneficiary was before the court when the grant was confirmed. Had the beneficiaries been present before the court, the court should have recorded that fact. I am satisfied that the confirmation of the grant was done without the consent of the other beneficiaries. It is therefore likely they were not aware of it. That was contrary to Rule 40 of the Probate and Administration Rules. The titles were also issued to Zaweria contrary to the court's order.

If indeed Zaweria was truthful, the question is why she did not have the grant confirmed as per her father's wishes by transferring Plot 767 to PW1 and subdividing the rest into the sister's names?

The grounds for revocation of grant are found in Section 76 of the Laws of Succession Act. The Section provides as follows:

“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 allegations of a fact essential in point of law to justify the grant notwithstanding that the allegations was made in ignorance or inadvertently;**
- d. That the person 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 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.”**

I find that the applicant has met the threshold for revocation of grant under the above Section.

The history of the property, the subject of these proceedings is that the land belonged to PW1 and DW1's father, Kanotha Ng'ang'a Ngure, who died in 1994; that the land was originally registered as Nyandarua/Kitiri/340; that Kanotha Ng'ang'a had the land subdivided into 4 portions, 767, 768, 769 and 770.

The said subdivision was supported by the green card (P.Ex.no.1) Mary Kanotha filed a Succession Cause and had the land transferred to her names and upon her death. DW1 got letters of administration and transferred the plots to herself. There is a dispute as who should inherit the deceased's land.

According to the objector, which evidence is supported by PW2's testimony, their father allocated him Plot 769, while Charles Ng'ang'a was given 767; that the father retained 768 which he later sold while 770 was given to the daughters, if they came back home from their marriages; that by the time the father died, he had sold Plot 768 to Richard Kabiru Ngunjiri and it was transferred to him on 15/9/1988; that Richard then sold it on 12/11/1997. Contrary to PW1 and 2's evidence, it is Zaweria's and DW2's evidence that the Plot given to Charles Ng'ang'a by the father was 768 while the applicant got 767 which he later sold to Njuguna Wakumu, Wachira Njuguna and Mary Wambui to enable him raise his bond after he was arrested and charged with a criminal case in Nairobi.

Whereas PW1 admitted that he was once arrested, he denied ever selling any land to anybody. In D.Ex.No.5 was a document made in Kikuyu language and translated into English and was an agreement made on 25/10/1993 between Kanotha Ng'ang'a (deceased) and Njuguna Wakumu in respect of a Plot measuring 2 acres and it was sold during the life of Kanotha Ng'ang'a Ngure. The objector was not a party to it.

The second document D.Ex.8 undated agreement for sale of 5 acres of land by Kanotha Ng'ang'a Ngure to John Ng'ang'a Njoroge for Kshs.325,000/=. It did not specify what land was being sold. Mary Wambui and John Ng'ang'a were the witnesses. Again, there is no evidence that the objector sold any land to Mary Wambui. Mary Wambui was recorded as a witness to the said transaction. The sale was by

the deceased not the objector.

Although DW1 alleged that Mary Wambui is in occupation of the said land and had recorded a statement, she did not testify before this court.

In the 3rd document, D.Ex.No.7 dated 2/10/1993 in Kiswahili language, it was made by Gachira Njuguna and Zaweria Wanjiru (DW1). In the said document, it is stated that Kshs.100,000/= was given to Zaweria Wanjiru. Again the objector does not feature anywhere in the agreement. It is clear from the documents exhibited by the petitioner that the objector never sold any land. If any land was sold, it was by their father Kanotha Ngure. The other agreements are between other people and Zaweria.

The petitioner also alleged that once her brother Charles Ng'ang'a died in 1987, his widow PW2 sold the land he had been given, that is, the Plot No.768. As pointed out earlier, PW1 and 2 denied that that Plot 768 was ever given to Charls Ng'ang'a but that Kanotha Ngure sold it during his life time.

I am inclined to believe PW1 and 2's testimony that Plot 768 was sold by Kanotha Ngure because when the deceased filed Succession in Kanotha Ng'ang'a Ngure's estate in Succession Cause 25/1995 (P.Ex.no.2), Plot 768 was no longer part of the estate. Besides, the green card shows the transfer Kanotha to the new buyer.

PW2, Teresia, wife to Charles Ng'ang'a corroborated PW1's evidence that her husband was allocated Plot 767. She denied that it has ever been sold. Indeed, Plot 767 is still one of those still registered in the name of Zaweria. She also denied that PW1 has ever sold his Plot which is 769.

PW1 also produced a witness statement as P.Ex.8, a statement written by one Raphael Kariuki Ng'ang'a whom he described as a brother to his late father. He recorded his statement on 10/11/2016 but he died in 2017. In the statement, Raphael stated that he was present when his brother Kanotha Ng'ang'a distributed to his children land after subdividing the land into 4 pieces, ABC & D. That he subdivided his land into 4, he sold Plot B (768) of 10 acres and gave his sons 10 acres each, Charles Ng'ang'a got 767, the objector got 769, and the daughters got (Plot D) 770 of 10.7 acres if they returned home; that the said Kanotha Ng'ang'a sold his portion 768 to Ngunjiri Kabiru. Indeed the green card P.Ex.No.3 for Plot.768 indicates that the land was transferred from Kanotha to Richard Kabiru on 15/09/1988 and has since changed hands and was further subdivided. There is no evidence to support the Zaweria's contention that both PW1 and 2 sold their portions of land. If they had, then 3 parcels of land would not be available for distribution because Zaweria is holding 3 parcels of land in her name. Although Zaweria alleged that Mary Wambui is directly in possession of the land sold to her by the objector, no evidence was adduced in support thereof and Mary Wambui did not appear to confirm that assertion.

Having found as above, the question then is how should the deceased's property be subdivided?

A look at the mutation form shows that the land was initially 16.5 Ha. (40.772 acres). Out of the Plot, 10 acres were sold. The balance is therefore 30.772 Acres.

The deceased died intestate survived by the five children. The distribution should be in accordance with Section 38 of L.S. Act which provides ***"That where an intestate has left a surviving child or children, but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, there be only one, or be equally divided among the surviving children."***

This Section must be read with Article 27(1) of the Constitution which prohibits discrimination on account of sex, race, religion e.t.c. Whether male or female, the children of an intestate are entitled to equal share of the deceased's estate.

Mr. Chege, counsel for the objector suggested that the deceased's children share the land equally save that PW2, wife of Charles Ng'ang'a to get 5 acres less so that the balance goes to John Ng'ang'a Njoroge.

Zaweria on the other hand maintains that the land be shared as their father Kanotha Ng'ang'a had suggested and even went ahead to carry out a mutation so that he could share out the property.

Counsel relied on the decision of ***Reginah Nyambura Wailathu v Tarcicio Kagunda and 3 others Succession Cause No.475/2013 (Nyeri)*** where the court observed that the purpose of subdividing the land by the deceased had the logic that he intended to accommodate all his children.

In this case, having found no evidence that the objector or Charles Ng'ang'a sold their land, it is my view that the whole estate of 30.772 acres be put together and shared out equally in accordance with Section 38 of the Laws of Succession Act. Each of the deceased's children will be entitled to 6.15 acres.

Mary Atieno, DW2 who claimed to be the wife of Charles Ng'ang'a, apart from the birth certificate which indicated that she had a child with Charles Ng'ang'a, there is no evidence that she was his wife. Siring a child by a couple is not evidence of a marriage. In any event, she renounced any claim to the deceased's estate having been satisfied that her son was given property in Dandora, Nairobi, where Charles Ng'ang'a had houses.

In the end, the deceased's estate will be shared as follows:

1. Zaweria Wanjiru Kanotha - 6.154 acres
2. Joseph Gitonga Kanotha - 6.154 acres

3. Susana Warima Kanotha - 6.154 acres

4. Hannah Wanjeri Kanotha - 6.154 acres

5. Teresia Wanjiru Ng'anga - 6.154 acres

(for house of Charles Ng'ang'a)

The grant of letters of administration made to Zaweria Wanjiru be and is hereby revoked and a new certificate of confirmation of grant be issued in the joint names of Joseph Gitonga and Zaweria Wanjiru.

Zaweria having secretly dealt with this matter to the exclusion of her siblings and having caused the case to drag for so long, I direct that Zaweria be condemned to pay the costs of this cause.

Dated, Signed and Delivered at NYAHURURU this **11th** day of **July**, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Ndegwa holding brief for Mr. Chege for applicant

Mr. Otieno for respondent

Soi – Court Assistant